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INSTITUTES  
OF  
INTERNATIONAL LAW,  
PUBLIC AND PRIVATE,  
AS SETTLED BY THE  
SUPREME COURT OF THE UNITED STATES,  
AND BY OUR REPUBLIC.  
WITH REFERENCES TO JUDICIAL DECISIONS.

BY DANIEL GARDNER, Esq.,

COUNSELLOR AT LAW, OF THE NEW-YORK BAR.

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## OBJECT OF THE INSTITUTES.

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At the Revolution royalty was abjured and self-government substituted. The original American doctrines of freedom were sustained by our revolutionary patriots.

Animated by a desire to perpetuate the blessings of our Union, the writer presents in the Institutes a plain and concise system of international law, public and private, in order that our intelligent people generally, as well as jurists, legislators, officers of our mercantile marine, commanders in the army and navy and diplomatists, might easily and cheaply understand them. To this end all technicalities are excluded, and the principles of law are stated with simplicity and brevity, referring to authorities. This work is intended to be popular as well as scientific. It is emphatically American, and rests mainly on decisions of the Supreme Court of the Union, and of other national courts, on State compacts, treaties and governmental acts. The adjudications of these courts settle all questions of international law, public and private, and the State courts are bound to conform to them. Our Chief Justices of the Supreme Court of the Union, Jay, Ellsworth, Marshall and Taney, and their able and learned colleagues, add a controlling weight to the constitutional supremacy of this high tribunal. State deci-

sions, in accordance with these, are also referred to. Our Presidents, their secretaries and foreign ministers, and our eminent American statesmen are largely quoted in the book. Among them are the honored names of Washington, Hamilton, Franklin, John Adams, John Jay, Jefferson, Madison, James Monroe, John Quincy Adams, Henry Clay, Daniel Webster, James Buchanan, Edward Livingston, De Witt Clinton, John C. Calhoun ; Secretaries Upshur, Clayton, Marcy, Everett and Lewis Cass, with a long line of distinguished public men.

The work explains our general commercial law, the settled judicial rules of navigation, and the common carrier's liability in maritime and internal affreightments.

The usages of war are set forth, but its atrocities are reprobated. The freedom of the seas is maintained, and a practical mode of introducing our American doctrine into the code international is suggested, by which private property by sea and land, and all non-combatants, shall be free from capture or molestation in war. To our merchants, ship-owners, importers and planters, as well as to the peace and industry of mankind, these principles are of the highest importance.

It is shown that our republic reduced our humane principles to practice in the military rule of conquered Mexico, under our distinguished generals, Scott, Taylor, Wool, Smith, Worth, and other gallant chiefs.

The law of comity in all its bearings is set forth.

The self-preserving, military, naval and judicial power of our Union and States against treason, menace and force is stated, and authorities referred to.

In short, the elementary doctrines of our international law, public and private, and the leading principles of our municipal law, common to all our States and Union, are presented in the Institutes. If the ends proposed have been accomplished in some degree, the writer will feel that his great labor has not been bestowed in vain.

NEW-YORK, *January*, 1860.



## THE AUTHOR'S

### Obligations to his Friends Acknowledged.

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To the Honorable Reuben Hyde Walworth, late Chancellor of the State of New-York, to the Honorable John C. Spencer, to the Honorable Joshua A. Spencer, to the Honorable Alexander H. Everett and to the Honorable Elisha R. Potter, the author is greatly obliged on account of examinations of, or suggestions in reference to the Institutes.

To Major-General John E. Wool he is greatly indebted for information and official documents, relative to American military administration during our conquest and occupation of Mexico, treated of in the thirteenth chapter.

On the tombs of his three distinguished friends who have been called away while the work was in progress, the author would inscribe this memorial of his gratitude.

To Mr. Justice Nelson, of the Supreme Court of the United States, the author acknowledges the favor of a consultation upon the limitation of State taxation, treated of in the third chapter.

To General Persifer Smith the writer is indebted for valuable information relative to our humane military government of the conquered Mexicans. And, with deep sorrow, would the author record his gratitude upon the tomb of the fallen hero of Contreras.



# GARDNER'S INSTITUTES.

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## CHAPTER I.

### NATIONS, NATIONAL IMMUNITY, SOVEREIGNTY AND EXECUTIVE ORGANS.

SECTION 1. As nations are the parties or political bodies subject to national duties, and possessed of national rights, which are treated of by public law, our first inquiry is what is a nation, what is a sovereignty, and what are its attributes?

A nation is an association of States, families or men, for the publicly avowed object of forming one of the community of nations, of governing itself without dependence on a foreign power, and having an organized government in some form capable of performing all international duties. Such an association, whatever may be its origin, is a sovereign State, with all the rights and duties pertaining to one of the family of nations.

No change in the internal organization of a nation affects the question of its nationality. England, under her kings John and Charles II., was the same nation that the Protector Cromwell presided over with an ability far surpassing that of any of her kings. The international rights and duties of nations are not generally affected by changes in their internal form of government. (*Grotius on P. & W. B. 2, c. 9, § 8, and c. 16, § 16. 1 Kent's*



*Com.* 5th ed. 167; *Wheat. Int. L.* P. 1, c. 2, § 11. *Vattel*, B. 2, c. 14, § 215.) The rule and exceptions are explained in the twelfth chapter.

The actual existence of a nation is a fact to be judged of by other powers, and a recognition of the fact by treaty or otherwise is merely an attestation of it by the State recognising the new one. A recognition is not the giving or transfer of a national character, but a simple admission that it exists at and before the date of the recognition. This principle is now well established.

Independent States sometimes submit to qualifications of their sovereignty by a treaty or compact of union called a constitution or confederation. The original thirteen colonies of the United States repudiated the government of Great Britain, and assumed to act as independent sovereignties in 1775, and July 4th, 1776, as the thirteen United States of America, they declared to the world that thus associated they assumed the position of a republican nation. These thirteen States, forming the United States, November 15th, 1777, formed a perpetual confederation, giving to the Continental Congress a portion of their sovereign powers, and retaining all municipal and a part of their national sovereignty. While known to other nations as the United States of America by their general Congress, the latter had no efficient internal power of compulsory action on the States and the people. Hence arose our Constitution, which conferred all national powers of the States on the general government, and constituted a Supreme National Court to decide all controversies between two or more States, and all questions under the treaties, constitution and laws of the Union. Vermont afterwards forcibly constituted herself a State *de facto*, by organizing a State government and repelling the jurisdiction of New-York. Her position of sovereignty, earned on many a revolutionary field of battle, was acknowledged

by the Commissioners of New-York in 1790, and in 1791 she was admitted into the Union. (3 *N. Y. R. St. App.* 423, 424. 1 *U. S. St. L.* 191.)

The 11th article of the confederation provided for the admission of Canada, if she joined the confederacy, and of other colonies, if nine of the United States consented.

The Constitution provided for the addition of new States, and of territory to form additional States from. These States, on the 1st of January, 1851, numbered thirty-one. The States cannot form compacts among themselves without the assent of Congress, nor can they make any treaty with any foreign power. The national government has the exclusive charge of our foreign relations, the exclusive control over foreign commerce and commerce among the States, and it has the sole power to declare war and make peace, to support armies and navies. The States, then, except in some few particulars, are sovereignties as to municipal law within their respective limits, and all their nationality is vested in the general government. Each State of our Union is bound to respect the sovereignty of every other, and avoid all interference with its domestic law and polity.

Nations that divest themselves of the power of declaring war or making peace, as the States of our Union have done, or assign to another State their right to the free navigation of the high seas, or become, in fact, by conquest or compact, dependent nations, as Carthage was after her league with the Romans subsequent to the second Punic war, lose their nationality, and are to be deemed subject nations. (*Grotius on P. & W. B.* 2, c. 15, § 7.)

If a nation is forced by a victorious enemy to allow, as a condition of peace, the garrisoning of certain fortresses or cities by the enemy's troops, it does not thereby lose its sovereignty and nationality. This was the condition

of Prussia for a time after the victories of Napoleon, and afterwards of France immediately succeeding the battle of Waterloo.

Nations organized by the controlling conventions of foreign powers, when duly established, as Belgium and Greece, belong to the family of nations.

A nation may lose its nationality by allowing another State habitually to control its internal affairs; as this is inconsistent with national independence.

The existence of a nation is a question of fact to be judged of by other nations, and in reference to this, every other nation decides for itself.

#### EQUALITY OF NATIONS.

SEC. 2. All nations duly organized, whether Christian or not, whether large or small, republican or monarchical, are equal; possess the same international rights, and are bound by the same international duties. (*Grotius on P. & W. B. 2, c. 9, § 8. Wheat. Hist. L. N. 230.*) Our declaration to the world in 1776 was, "We hold these truths to be self-evident: that all men are created equal; they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness." These great truths, the universal, inherent, natural right of self-government, and the equality of all nations and all men in political rights, affirm, of necessity, the entire equality of all organized nations in the view of public

law. Vattel maintains the right of a nation to change its government as it may judge expedient. (B. 1, c. 3, §§ 32, 33, and c. 5, §§ 61, 66.) The changes of the governments of France, Great Britain and other States, and their recognition, have practically affirmed the doctrine of our Declaration of Independence, that the right of self-government resides in the body of every nation. The Constitution of the French Republic of 1848 re-asserts the same doctrine. The election of Louis Napoleon, Emperor of the French, in 1852, rests on this principle.

## NATIONAL INTERNAL IMMUNITY.

SEC. 3. From the sovereignty of a nation, and its inherent and natural right of self-government, follows of necessity the principle that the internal administration of every sovereign State belongs to its citizens only, and that no power has any right to interfere in the internal government of a foreign country. (See *Am. St. Pap.* from 1811 to 1815, pp. 631, 632. *Wheat. Int. L.* P. 2, c. 1, § 15. *Vattel*, B. 2, c. 1, § 18; c. 4, §§ 54, 57. *President Jackson's Mess. of 1836.*) In the instructions of Henry Clay, Secretary of State of the United States, communicating, with the sanction of President Adams, the general principles of our Republic, in his instructions to our ministers to the Congress of Panama, in 1826, we have this doctrine clearly and strongly laid down. The Secretary says: "Finally, I have it in charge to direct your attention to the forms of government and to the cause of free institutions on this Continent. The United States never have been and are not now animated by any spirit of propagandism. They prefer, to all other forms of government, and are perfectly satisfied with, their own confederacy. Allowing no foreign interference, either in the formation or in the conduct of their government, they are equally scrupulous in refraining from interference in the original structure or

subsequent interior movement of the governments of other independent nations."

James Buchanan, Secretary of State, in his instructions to the American Minister at Paris, dated March 31st, 1848, re-affirms the same doctrine as the settled policy of our Republic. The annual message of President Fillmore, of December, 1851, strongly sets forth this American doctrine. These declarations of our Republic seem in accordance with right reason, and lay down the only rule of public law compatible with the security of nations, and with their natural right of self-government. Great Britain, under her splendid Prime Minister, Canning, concurred with our Republic in resisting the right of the allied sovereigns of Europe to interfere in the new Spanish-American governments. Entire immunity of every nation from foreign interference in its internal affairs is a principle of international law, plainly essential to the preservation of its liberty and sovereignty, nay, of its existence as a nation. (*Rush's Res. at Court of Lond.* 413, 430.)

Some of the most remarkable instances of unauthorized interference by foreign nations in the domestic affairs of other States, in modern times, are the papal interpositions to control princes and their kingdoms; the attempts by the king of France to control Charles II. and James II., their ministers and parliaments, by direct bribery, in order to influence the English government; the assumption of other nations to dictate to the French people, from 1792 down to 1815; their external organization, to establish legitimacy and put down elective governments in France; the retaliatory effort of Republican France to diffuse Republicanism by the sword; the armed intervention and invasions of Naples, in 1821, by Austria; of Spain, in 1823, by France; of Hungary, by Russia; and of Rome, in 1849, by Republican France, to put down free government; and of China, by Great Britain, to enforce the introduc-

tion and use of British opium against Chinese policy and law, to enrich Britain by demoralizing China. The treaty of Verona, of November 22d, 1822, made by the Holy Alliance, to suppress representative governments in Europe and America, by its combined powers, was a bold avowal by this unholy league of a right to extend despotism by force over the earth. This monstrous pretension was promptly met by the American doctrine of non-intervention of European powers in the affairs of the American continent, and a denial of all further European right of colonization of waste lands in America, proclaimed by President Monroe, and supported by the British government, under its celebrated *premier* Canning. This great and unprincipled project of the Holy Alliance was thus defeated.

In the sixteenth century, Philip II. of Spain sought to conquer and dismember France. In the nineteenth century, by a just retribution of Providence, Napoleon, Emperor of the French, conquered Spain; and though reconquered for Philip's besotted and despotic descendant, Ferdinand, by British and Spanish arms, the vast domains of Spain on the American continent were liberated from the mother country and from European control. These wars of ambition gave freedom to mighty countries in America, capable of supporting in comfort half the people of the globe. The royal belligerents looked to these vast rich and fertile regions as part of the spoils of victory; but a kind Providence gave them emancipation as the result of these bloody wars of ambition.

These armed interventions are as useless as they are unlawful. Foreign bayonets displaced the great Napoleon, and placed Louis XVIII. on the throne of France; and he and his successor, Charles X., held it about fifteen years only, when Louis Philippe became king of the French, under a pledge to La Fayette and his friends to establish

a monarchy surrounded by Republican institutions. This monarch, faithless to his promises in favor of freedom, in 1848 was exiled, and the Republic of 1848 was established. The Bourbons were driven out, and Louis Napoleon Bonaparte, the nephew of the Emperor, became President of France. In December, 1851, he established himself sole ruler of France, by force, and became Prince-President, with imperial power. In 1852 he became Emperor of the brave French by election; so the Bonaparte dynasty and the Code Napoleon remain in France. So much for armed interpositions in France, to displace the Bonapartes and establish the Bourbons, now unhappy exiles, and so likely to remain.

The royal crusade against representative governments has proved a failure. The constitutional government of Great Britain was imitated, in 1848, by most European governments, and liberal constitutions were made by the people, in their parliaments, and sworn to by their kings. Though most of these governments have been temporarily overthrown by the resuscitated Holy Alliance, its armies and diplomacy, aided by royal perfidy and perjury, and by socialism, the bane of social life and the enemy of freedom, the two most powerful nations, Great Britain and the United States, still present to the world their splendid example, to lead all nations to freedom and prosperity. The night of despotism may rest for a time on Europe, but the volcanic fires of liberty are still burning in the bosom of European society, and the dawn of liberal institutions is at hand. In a century, we predict that every European government will be either a republic or a liberal constitutional monarchy.

The law of nature, the law of nations and revelation, alike forbid the forcible intervention of one nation in the affairs of another sovereign State. These doctrines are



strongly supported by Phillimore, in his able work on international law. (Vol. i. 454—457.)

But the doctrine of non-intervention has its limitations and exceptions. If a nation, by land or sea, carries on a war, so as to injure the essential commercial interests of a neutral nation, the latter may interpose in its discretion, and compel the removal of cruisers to a safe distance from its shores, or the cessation of such a war. The American government, on this ground, has declared the Gulf Stream and the inner waters exempt from belligerent action. The interposition of Great Britain, France and the United States, in Hayti, to stop the savage war of the sable emperor, had such an object. So, if a cruel, exterminating war is waged against a newly-formed sovereign State, seeking to establish its freedom, and to defend the natural right of self-government, and it is assailed by the parent nation and her allies, or by a savage and ruthless warfare, any nation may interpose its influence or its power to save a noble and struggling people from destruction. Such was the intervention of France in our revolutionary struggle, and of that power and her allies at Navarino to save Greece. So, if any power seeks, by cession, mortgage, protectorate, colonization or war to obtain territory in the vicinity of a nation that will endanger her safety or essential interests, the latter may, in her discretion, interpose to prevent the menaced injury.

If any European monarchy or power should establish a protectorate over Cuba, or Central America, or Mexico, this principle of public law, founded on a right of self-preservation, would authorize the American Republic to resort to the *ultima ratio regum et populorum* to destroy it, and drive away from our vicinity and from the inter-oceanic passes of Tehuantepec, Nicaragua and Panama, all European occupation, protection or intervention.

This is the doctrine of President Monroe and his successors in office, and of all American statesmen.

James Buchanan, while Minister to Great Britain, and his associate American ministers at Paris and Spain, declared their assent, at the Ostend Conference, to this doctrine. The royal governments of Europe are hostile to our republic and its free institutions, as the diplomatic and protectorate movements of these powers prove; all tending to impede our peaceful expansions at the request of adjacent people, territory and States, for their and our common advantage. It is American policy, justified by the right of self-defence, to resist all future European colonization, and all protectorates over any part of the American continent or the adjacent islands.

Intervention to secure religious liberty has lately been sanctioned. The year 1858 has been remarkable for treaties between the United States and China and Japan, by which religious freedom has been established in those countries for American citizens, as well as for the Chinese and Japanese. There are four hundred millions of people who have been brought, by God's providence, within religious liberty and the power of free Christianity.

The treaties of China and Japan with Russia, France and England are to the same effect.

Thus these four great nations have become instruments in establishing free commerce and religious freedom in China and Japan. All Asia and the islands of the East will be brought under the benign principles of the Gospel by the influence of these powerful nations, and free Christianity and free institutions will, no doubt, be carried by American commerce, language and influence over the entire habitable globe. This is our divine mission. The time will come, though it may be yet in far-off centuries, predicted by the holy prophets, when Christianity shall be universal, Jesus Christ shall be acknowledged Lord of

Lords, and the Gospel the foundation of all law and human obligation. In one or two centuries this happy consummation of prophetic vision may be realized.

The treaty of Paris with Turkey, and the treaties with China and Japan, have now settled the principle of religious freedom, and the right of foreign nations to interfere to enforce such right in favor of natives as well as foreigners.

#### RIGHTS OF PROPERTY AND JURISDICTION.

SEC. 4. Another leading attribute of sovereignty is the right of ownership of every nation of all ungranted lands within it, and of a general and exclusive jurisdiction over its territory. (*Grotius on P. & W. B. 2, c. 8, § 9. Ruth. Inst. 488. Calder vs. Bull, 3 Dallas, 386. 6 Cranch, 142. 16 Pet. 367, 409. 8 Wheat. 543. 5 Pet. 1. 1 Pet. 542.*) The law of comity imposes limitations on this rule.

In our Union the aborigines had only a possessory title, and in the original thirteen States each owned in fee, subject to the Indian right, all ungranted lands within their respective limits; and beyond the States the residue of the ungranted lands were vested in fee in the United States, subject to the Indian possessory right to the extent of the national limits. All territory added by treaty or conquest is national domain.

The English possessions in America were claimed by virtue of discovery, and not by conquest. (16 *Pet.* 409. 5 *Wend. R.* 445.)

By the treaty of peace of 1783 all the rights of Great Britain to the territory of the Union, and its appurtenant rights of fishery on the banks of Newfoundland, &c., were acknowledged to be in the United States, and in the States respectively. (16 *Pet.* 410, and the cases in this section cited. 12 *Wheat.* 523. *Wheat. Int. L. P. 3, c. 2, § 9.*)

As a consequence of this doctrine, the right of pre-emption of Indian lands has been, by State laws and acts of Congress, secured to the government, State or national, owning the fee. And hence the State laws secure to the States, by escheat, all lands within their respective limits having no legal owners. Hence, also, no contract or treaty is allowed to be made by any foreign nation with Indians located within the United States. They are, as to us, dependent tribes. (5 *Pet.* 1.)

The right of nations to colonize a country like the United States in its original state, over which a few Indians roamed and hunted, and to cultivate it, is plain by the law of nature and of nations. God commanded Adam, as the penalty of his transgression, and as the permanent law of all his posterity, to possess the earth, to till it and live by toil. The gift was to all to cultivate. And Paley, in his *Moral Philosophy*, says, that by the law of nature no man can make title to any particular portion of the earth except by actual incorporation of his labor with it, and by separate appropriation. The Pilgrim Fathers, by the pen of Robert Cushman, asserted their right of colonization, on the ground, 1st. That the land belonged to the King of England by discovery; 2d. That one object of the settlers was the conversion of the Indians; that the land was "spacious and void," and that the Indians ran "over the grass" like "foxes and wild beasts;" that they had no "faculty to use either the land or the commodities of it;" that "as the ancient patriarchs, therefore, removed from straighter places into more roomy, where the land lay idle and waste, and none used it—though there dwelt inhabitants by them—as in Genesis xiii. 6, 11, 12; xii. 20, so it is lawful now to take a land which none useth, and make use of it." 3d. That they settled by the consent of the Great Sachem, Massasoit, and other sachems ruling there, and that the Great Sachem acknowledged King

James as his sovereign, and they settled as an English colony at Plymouth; that the Great Sachem gave them permission to settle any land within the wide range of his power. (*Chronicles of the Pilgrims*, 242 to 245, and n. 1, to 245. *Paley's Mor. Philosophy*, ed. of 1806, p. 94.)

As the earth was given to all men to cultivate, the Indian possessory title seemed hardly sustained by the law of God or by sound ethical law. The pilgrims and their successors have respected all actual Indian possessions; and the United States and the several States of the Union have, prior to 1852, probably paid the Indians, for their imperfect title, ten millions of dollars or more.

#### RIGHT OF ACQUISITION.

SEC. 5. Nations, by virtue of their sovereignty, have not only a right to acquire territory by purchase or conquest, but also by the right of prior discovery and actual settlement of an unoccupied country. (1 *Pet.* 542, *ante*, § 4. *Grotius on P. & W. B.* 2, c. 2, § 4. *Wheat. Int. L.* P. 2, c. 4, § 5.) *Puffendorf*, *Vattel*, *Von Martens*, *Kluber*, *Hefter* and *Oppenheim* are all to the same effect. In such case title by discovery must be followed by actual, continued and exclusive occupancy to perfect it. (See Webster's Letter of 21st of August, 1852, to Charge d'Affaires of Peru, in reference to the Lobos Islands.)

The Secretary says: "As to the claim of Peru to those islands, founded on the law of proximity, the question will appear to be free of doubt. The well-settled rule of modern public law on this point is, that the right of jurisdiction of any nation whose territories may border on the sea, extends to the distance of a cannon shot or three marine miles from the shore, this being the supposed limit to which a defence of the coast from the land itself can be extended.

“The whole discussion, therefore, must turn upon this, viz.: the Lobos Islands lying in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity or adjacent position, has the government of that country exercised such unequivocal acts of absolute sovereignty and ownership over them as to give to her a right to their exclusive possession, *as against the United States and their citizens*, by the law of indisputable possession? And the undersigned repeats that this is not a question between Peru and other governments who may have more or less distinctly admitted her right, but it is a question between Peru and the United States who have so long exercised that right, and remonstrated against its interruption.

“The government of the United States, however, is prepared to give due consideration to all facts tending to show possession or occupancy of the Lobos Islands by Peru, and is not inclined to stop or preclude discussion until the whole matter shall be thoroughly investigated. If there are any facts or arguments which have not been brought to its consideration, they shall receive the most respectful and friendly attention. If it shall turn out that, as has been intimated above, those islands are uninhabited and uninhabitable, and therefore incapable of being legally possessed or held by any one nation, they and their contents must be considered as the common property of all. Or if, unprotected by the presence of Peruvian authorities and without actual possession, their use has been by Peru abandoned or conceded, without limitation of time, to citizens of the United States for a long period, or yielded in consequence of the remonstrance of this government or its agents, then no exclusive ownership can be pretended against the United States at least.” Peru afterwards satisfied our government that the title of Peru was complete.

A settlement made under a parent State carries with it

its jurisdiction and nationality. But if such colony is made upon an independent national organization, and it becomes actually capable of performing international rights and duties, then it becomes one of the family of nations.

SEC. 6. It is said that contiguity gives one nation, other things being equal, a superior right to colonize a country and extend its jurisdiction over it. By this principle a settlement at the mouth of a river might perhaps be deemed to extend over the country drained by it. The United States claimed Oregon under the treaty with France ceding Louisiana, and that of Spain ceding Florida, and her rights to Oregon, by prior discovery and settlement, Spanish and American, and by contiguity. The Oregon treaty of 1846 happily adjusted the conflicting claims of our Republic and Great Britain, and fixed our northern boundary at latitude 49, and made the extensive and noble harbor of the Straits of Fuca common to both nations. This doctrine enables a maritime State to hold as part of its territory all islands within three marine miles of its coasts.

All questions of national boundary are fit subjects of arbitrament, if they cannot be settled by negotiation. All such questions ought to be adjusted by negotiation, or by arbitrament, if there are any real doubts in the case.

#### STRAITS OF FUCA COMMON TO BOTH NATIONS. RIGHTS TO RIVERS, LAKES, &c.

SEC. 7. A nation's sovereignty covers its entire territory, land, rivers, lakes and islands. (*Grotius on P. & W.* B. 2, c. 8, § 9. *Vattel*, B. 1, c. 18, § 204; c. 22, §§ 266, 274. And where a river, sound or lake is a national or State boundary, the middle of it, or of the channel, is the line, unless by compact or usage a different boundary is agreed on. (*Vattel*, B. 1, c. 22, §§ 266, 274. 5 *Wheat.* 379. *Grotius on P. & W.* B. 2, c. 3, §§ 16—18. 3 *Mason*, 147. *Wheat. Int. L.* P. 2, c. 4, §§ 9—11.)



Hence, natural insensible alluvions on either side to the shores, or in the form of islands, belong to the contiguous territory; but if a river abandons its bed and cuts a new channel, the centre of the old bed continues the boundary. (*Ib.*) But no artificial works can be erected by either riparian State or nation to change the natural flow of the water to the injury of the other. (2 *N. Y. Canal L.* 523. *Vattel*, B. 1, c. 22, § 271.) This doctrine is applicable to the States of our Union.

It would seem that bridges and other obstructions across or in international dividing waters ought not to be erected without the joint consent of the nations or States owning them. (*Ib.* 14 *Pet.* 569, 570, 573—578, 598.)

Virginia, in her deed of cession to the United States of the territory northwest of the Ohio, fixed the northern boundary of that State at low-water mark on the north side of the Ohio, and it remains the limit of that State and of Kentucky, as well as of the States adjacent formed out of that territory. (3 *Dana's Ken. R.* 278, 279. 5 *Wheat.* 378, 379. *Code of Virg.* 1849, pp. 49—54. 1 *St. Ohio*, 62.) So far as compact allows the States on the north bank concurrent jurisdiction over the river, it exists, and no further. (*Ib.* See, also, 13 *How.* 397.)

By compact between Virginia and Kentucky, the navigation of the Ohio is free.

The Potomac River and Chesapeake Bay are subject, to a certain extent, to a concurrent jurisdiction of Virginia and Maryland. (*Code Virg.* 54—57.)

A like compact exists between New-York and New-Jersey as to the Hudson River and waters of the Bay of New-York and adjacent waters. (3 *N. Y. Rev. St.* 175, 187—189. *St. N. Jersey*, 38, 39.) Limits and jurisdiction are regulated.

By acts of Congress and constitutions of our western States adjacent to the great lakes and rivers of the West,

similar regulations exist. (3 *U. S. St. L.* 546, § 2 ; p. 429, § 2 ; p. 289, § 2. 5 *Ib.* 743, § 3. *Const. Wisc.* Art. 9, § 1.)

The rule of public law is thus declared by the Supreme Court of the United States: "When a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream." (5 *Wheat.* 379.)

Of necessity, concurrent jurisdiction arises where a navigable river, lake or inland sea divides two States or nations.

By right and necessity, where two nations or States are divided by such watery boundary, a right of common navigation exists in them.

Such of our great lakes as are bordered by the United States on one side and by British America on the other, and divided by the national boundary, are subject to a curtilage by the opposite riparian nations, but a common right of navigation and of concurrent jurisdiction exists. Such jurisdiction and a common right of fishery ought not to invade a three-mile curtilage of the opposite nation on the lake shores, or in straits six miles wide or more. In narrower straits, each nation ought to confine its fishery, as far as practicable, within its limits. In places where no perception of the line is practicable, a common fishery jurisdiction is unavoidable.

The same principle is applicable to the Bay of Fundy, bordered by the United States and British America. A common right of fishery in the bay, without the maritime curtilage, exists as a natural right in each party independently of treaties.

The doctrine is applicable to our States bordering on Delaware, Chesapeake and other bays upon which two or more States bound. Where two or more nations adjoin a bay, a common of fishery in the whole bay, beyond the curtilage of each, exists, as it is the common feeding-

ground of all the fish that enter from the sea or dwell there. If one nation owned both capes of a bay, and another owned the residue of its shores, the former would have no right to obstruct the entry of the sea or of fish to the injury of the inner nation. If the bay is six miles or more across, each party, as far as practicable, ought to respect the other's curtilage.

Among our States the same rules apply.

#### MARITIME CURTILAGE.

SEC. 8. The sovereignty of a nation or State covers a maritime curtilage to the extent of a marine league from an ocean, sea or great lake coast, and low mud islands are deemed part of the coasts if within three marine miles from the shore. (*Wheat. Int. L. P. 2, c. 4, §§ 6, 9, 10.*) Indeed, the headlands of a coast may well be taken, and lines run from them a marine league seaward, and these being connected by straight lines, may be assumed as the territorial limit of a State or nation, and thereby include all great bays and gulfs within the curtilage. (*Ib.*)

All maritime nations are entitled to such curtilage, and where a nation owns the headlands and shores of a bay, though the distance from cape to cape at the entrance exceeds two marine leagues, two lines may be projected a marine league seaward, and a straight line uniting them would form the outer limit of the nation's exclusive jurisdiction, including the inclosed bay. Exceptions are sometimes made by partition treaties or conventions, allowing foreign citizens to fish there, &c., as by our treaty of 1783 and convention of 1818, and by our Reciprocity Treaty. (*Wheat. Hist. L. N. 225, 577; Wheat. Int. L. P. 2, c. 4, §§ 6, 8, 9, 10. 11 Wheat. 42, 45. 1 U. S. St. L. 384—386. Vattel, B. 1, c. 22, §§ 287, 289.*)

If the territory of a nation covers a maritime curtilage, or portion of any navigable lake or inland sea, an exclu-

sive right of fishery and jurisdiction exists, qualified as above stated. (*Ib.*)

Our little isles off the coast of Florida seem to be natural continuations of the land, and may be considered the outer border of our continental territory, from which our curtilage extends seaward.

SEC. 9. By virtue of sovereignty, a nation has exclusive jurisdiction over all its public and private vessels on the high seas, and over all persons on board, as well foreigners as citizens. Its laws may not only extend to such vessels and persons, but to its citizens on desert islands or savage coasts, where there is no municipal law to regulate their conduct. (*Webster's Dip. & Of. Papers*, 85. *Wheat. Hist. L. N.* 651, 691, 723.)

The pretended right of search of neutrals by belligerent cruisers for the persons or property of the enemy, or for the seamen, soldiers or subjects of the nation under the flag of which the cruiser was sailing, is a palpable violation of the exclusive jurisdiction which every nation possesses over its ships on the high seas and all on board. A forcible entry and search of a vessel for any such purpose is an unjustifiable act of violence and an invasion of the floating territory of the State whose flag she bears. It is a violation of the freedom of the seas. The usage rests on force, and not upon any principle of natural law. (*Ib. Wheat. Hist. L. N.* 225, 396—398, 651, 691, 739. *Am. St. Pap.* from 1811 to 1815, pp. 151, 152, 155, 427, 429, 485, 568, 577.)

By the maritime treaty of Paris, of 1856, this wrongful belligerent custom is forever abandoned.

Although a nation cannot properly extend its municipal law or marine police to foreign vessels on the high seas, it may seize and punish pirates, as they are enemies of every people.

Upon the ground of self-defence, a maritime State may

by law provide for the search and seizure of vessels suspected of illicit traffic with its coasts or people several leagues from its shores; the precise distance is not ascertained by usage, but depends on the position and circumstances of each coast. If found guilty of attempted illicit trade, the law may authorize the confiscation of the ship and cargo. (1 *U. S. St. L.* 647, 648, §§ 26, 27. 6 *Cranch*, 281. 2 *Ib.* 187. *Act of Parliament*, 9 Geo. II. ch. 35.)

Upon the same principle, foreign ships of war hovering upon the coasts of a neutral, and making captures of merchant ships near its ports, to the injury of its commerce, may be compelled to withdraw by force, if need be, and to cease to hover upon its coasts. (*Wheat. Hist. L. N.* 567, 570, 577. *Wheat. Int. L. P.* 4, c. 3, § 12.)

President Jefferson properly claimed the Gulf Stream as a limit within which foreign belligerents should not carry on war. (*Am. St. Pap.* from 1801 to 1806, p. 261.) All peaceful nations are entitled to such immunity.

Though the jurisdiction of every nation is exclusive over all its territory, all public and private armed ships of foreign States, admitted by an express or tacit assent, are treated generally as exempt from the local jurisdiction. (*Wheat. Int. L. P.* 2, c. 2, § 3. 7 *Cranch*, 139.) The same practical rule is generally followed as to merchant vessels of foreign nations arriving in distress.

Offenders against the laws of a country, flying on board foreign armed or unarmed vessels, are liable to be arrested there. (2 *U. S. St. L.* 339, 340.)

An army passing through a neutral State by consent of the government, is exempt from the local law. (*Ib.* *Vattel*, B. 3, c. 7, § 120. *Wheat. Int. L. P.* 2, c. 2, § 3.)

The same rule applies to a foreign executive. (*Ib.*) In all these cases, the exemption is by national comity. The jurisdiction of a nation being co-extensive within its territory, all exemptions from its authority and law must proceed from its consent. (*Ib.*)

SEC. 10. A nation's exclusive jurisdiction, by virtue of its sovereignty, extends over its maritime curtilage, if it be a maritime State. Riparian nations bordering a navigable river or lake, have a common right of navigation for commercial purposes, even though one nation may own both banks of a part of the river or of a strait, leading to the ocean, or from lake to lake. (*Von Martens*, 160. *Wheat. Hist. L. N.* 498—501, 508, 552, 553.)

The United States asserted this doctrine with regard to the Mississippi, and secured it by treaty with Spain. (8 *U. S. St. L.* 140, art. 4.)

Henry Clay, Secretary of State, in his instructions of 1826 to the American minister at London, insisted on this doctrine as applicable to the St. Lawrence. He affirmed, that as a riparian nation, our republic had a natural right to the free navigation of that river. (*Am. Ann. Reg.* vol. 2, pp. 137—139, 141—144. *Wheat. Int. L.* P. 2, c. 4, § 19.) And if the St. Lawrence were in fact navigable from the United States by sea-going vessels, he was unquestionably right.

The reciprocity treaty has opened forever to Americans the navigation of this noble river.

The natural right of riparian States and nations to the common navigation of navigable seas, rivers, bays and straits, connecting seas, oceans and great lakes, is generally acknowledged and practiced by all civilized nations. (*Ib.* 3 *Am. Ann. Reg.* 397. *Wheat. Hist. L. N.* 478—506, 547, 552, 553, 564, 567. *Wheat. Int. L.* P. 2, c. 4, §§ 16—19.)

The treaty of Russia with the Porte of 1829, and our treaty with that power in 1830, the treaties of Vienna of 1815, our treaty with Great Britain of 1842, and our Oregon treaty with that power, and the treaty of the great powers at the Paris Congress of 1856, all affirm these doctrines. In Europe and America the principle

is maintained of the freedom of straits and seas, and great navigable rivers, to the peaceful commerce of all nations with the riparian nations that border them. Hence it seems that a riparian nation, owning even both shores at the mouth of a great river like the St. Lawrence, the La Plata, the Amazon, the Parana or the Danube, has no right to levy tolls upon or impede maritime commerce with any other riparian State or nation.

#### NATURALIZATION.

SEC. 11. Another right of national sovereignty is found in a nation's authority to incorporate persons born out of its jurisdiction into it by naturalization. This is a dictate of nature, and has been practiced by the aborigines of America from a remote period to the present time. Our constitution and laws allow naturalization. (*Wheat. Int. L. P. 2, c. 2, § 6.*)

The laws of France provide for naturalization, upon the principle upon which our law reposes. (See *Les Douze Codes*, liv. pre. ch. 1st, and 2d *Code Napoleon*, London ed. of 1827, pp. 5, 6.) Great Britain has asserted in her municipal laws a contrary principle, and employed her great navy to establish by force the serfdom of every man born within the jurisdiction of that government. She has, by her armed ships, unlawfully stopped merchant vessels of other nations, and even their ships of war, on the high seas, and taken by violence such sailors from on board as a British officer chose to call Englishmen, who were often Americans, and compelled them to enter the naval service of Britain and fight her battles. The bare statement of this doctrine, alike shocking to humanity and condemned by the law of nations, is sufficient to show that it rests upon force, and not upon any legal or moral principle. This assertion of perpetual allegiance is a feudal principle of the dark ages, based upon the idea that every



man was born the slave for life of some liege lord, a proposition that Christianity and public law have forever repudiated. Vattel correctly lays down the law of nations in these words: "A nation, or the sovereign who represents it, may grant to a foreigner the quality of citizen, by admitting him into the body of the political society. This is called naturalization." The fundamental law of each nation regulates the mode and terms of naturalization, and it may confer on aliens all the political rights of the State, or they may be disqualified for holding certain offices, as in the United States, the Presidency, for example. (*Vattel*, B. 1, c. 19, § 214.) The French code, above cited, conforms to the law of nations as laid down by Vattel. It is in these words: "*La qualité de Français de perdra ; par la naturalization acquise en pays étranger.*" The Constitution of the United States confers on Congress the power "to establish a uniform rule of naturalization." (Art. 1, § 8.)

Nature teaches us that naturalization of foreigners is a sovereign right of every nation, and that often it is a duty. (*Wheat. Int. L. P.* 2, c. 2, § 6.) The United States have a territory sufficient to accommodate five hundred millions of people. Europe and parts of Asia are crowded with population; and in England the soil has fallen into the hands of a few proprietors, so that the great body of the Anglo Saxons, common English people, have been deprived of any share in the soil of Britain. Our republic, having a vast, vacant or uncultivated country, offers to restore to every man, at a trifling price, his share of the earth, his patrimony by the gift of God. All the unprovided families of Europe or Asia may each obtain in our republic a fine farm of one hundred and sixty acres for two hundred dollars, equal to forty pounds sterling, or one thousand francs, with a right of citizenship in our country, whose fundamental maxim is, that all men are born free and equal, and possess the inherent and inalienable right of self-government.



It is the right and duty of our republic to afford, in her vast territory, an asylum for the crowded or oppressed people of all nations. Expatriation is a natural right, and it has so been considered by Franklin, Washington and all our statesmen. The humane principles of our government in reference to naturalizing poor foreigners, and furnishing them with fee simple farms cheaply, were well set forth by Daniel Webster, Secretary of State of the United States, in a letter to Lord Ashburton, the British Minister at Washington, in August, 1842. (*Wheat. Hist. L. N.* pp. 741, 742. 4 *Spark's Life of Franklin*, 460. *Lord Bacon's Works*, Am. ed. 37.)

Naturalization is, therefore, a clear right of sovereignty. William L. Marcy, Secretary of State, in his letter to M. Molina, well says :

“The right of expatriation is not, I believe, withheld from the citizens of any free government, or from residents under its jurisdiction. \* \* \* \*

“The laws of neither country, (Costa Rica and the United States,) it is presumed, have conferred the authority to examine into the motives which may lead any one to exercise the right of expatriation.

“The liberty to go where hopes of better fortune may entice them, belongs to freemen, and no free government withholds it. It is, therefore, no cause of complaint against a neutral country that persons in the exercise of this right have left it, and have afterwards been found in the ranks of the army of a belligerent State.”

#### EUROPEAN COLONIZATION AND INTERFERENCE IN THE AMERICAN HEMISPHERE.

SEC. 12. The right of colonizing the unappropriated parts of the earth, not included within the bounds of any organized government, also belongs to the sovereignty of every nation. It has been practiced from the palmy

days of Tyre to the present time. Carthage was a colony of Tyre. When Columbus discovered America it opened a great continent to Europeans, and they sought, by prior discovery and occupation, to appropriate as much as possible of it. This right cannot reach any wild lands within the limits of any organized State. It is of necessity confined to such parts of the earth as may be uncultivated, or unappropriated by any organized State. As the earth belonged to the Lord, who has given it to the whole family of man, as Revelation declares, no individual, by the law of nature, can secure a prior right to any given portion of it, except by actual cultivation or appropriation. Nomadic tribes, therefore, have only a qualified possessory right, which ought, in all cases, to be extinguished by purchase; but they have no natural right to exclude the rest of mankind from the occupancy and cultivation of a soil they refuse to subdue and improve. The natural right of every man and of all nations is to appropriate a reasonable portion of the earth, to subdue and till it, in order to provide sustenance and the comforts of life. No man has a right, by the law of nature, to prohibit another from enjoying this right, provided all inclosed, cultivated or appropriated tracts of land are not interfered with. (*Am. Ann. Reg. for 1827—1829, part 2d, p. 44.*)

Where, however, an uncultivated country is included within the territory of any civilized nation, no title can be acquired to it except according to the *lex loci*, and no foreign government has any right to send colonists to occupy it.

In the United States a great principle of public law was proclaimed by President Monroe, with the approbation of John Quincy Adams, John C. Calhoun, Henry Clay, Thomas Jefferson, of Congress, and of the American people, in the President's Message to Congress in Decem-

ber, 1823. In it he said that our republic would consider any attempt on the part of the Holy Alliance "to extend their system to any portion of this hemisphere as dangerous to our peace and safety."

The President declared that "the American continents, by the free and independent position which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European power; and while existing rights should be respected, the safety and interests of the United States require them to announce that no future colony or nation shall, with their consent, be planted or established on any part of the North American continent."

"The question," said Mr. Jefferson, "presented by the letter you have sent me, is the most momentous which has ever been offered to my contemplation since that of independence. That made us a nation—this sets our compass and points the course which we are to steer through the ocean of time. And never could we embark on it under circumstances more auspicious. Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. We should, therefore, have a system of our own, separate and apart from that of Europe. The last is laboring to become the domicile of despotism; our endeavor should surely be to make our hemisphere that of freedom."

In 1848 President Polk re-asserted this American doctrine. (1 *Stryker's Am. Reg.* 436.)

President Pierce, in his inaugural address, March 4th, 1853, has thus announced his solemn assent to these doctrines:

"And in this connection, it can hardly be necessary to

re-affirm a principle which should now be regarded as fundamental. The rights, security and repose of this confederacy reject the idea of interference or colonization on this side of the ocean, by any foreign power beyond present jurisdiction, as utterly inadmissible."

Henceforth, these are settled principles of American public law and policy.

— SEC. 13. As an attribute of sovereignty, every nation has a right to act and contract, and regulate its relation to foreign nations and their citizens, by its constitutional executive organ, emperor, king, president, dictator, consul, protector or directory; and treaties and acts made and done by a government *de facto*, as to foreign nations and their citizens, are binding. (*Wheat. Int. L. P. 3, c. 2, § 1; c. 1, § 1. Wheat. Hist. L. N. 546.*) Vattel is to the same effect.

The right, by comity, to sue and assert its property rights in foreign courts, is allowed in all civilized nations.

#### SELF-PRESERVATION.

SEC. 14. One of the leading attributes of national sovereignty is the right of self-preservation. The right of self-defence belongs alike to individuals and to States. Grotius well declares that the right of self-defence confers authority on States and nations to punish criminals capitally, as well as to make wars; the application of force to be limited in degree to the necessity of the case. The deprivation of an enemy of property, or making war upon him according to civilized usages, must, to be justifiable, proceed substantially upon defensive principles. A war may be in form invasive or offensive, like our war with Great Britain of 1812, in defence of the freedom of the seas, or our war with Mexico of 1846–47, and yet be, as they were, substantially defensive wars.

Defensive wars, necessary to protect important and es-

essential rights of a nation, may lawfully be resorted to after all pacific practicable means of redress have been resorted to in vain. (*Wheat. Int. L. P. 2, c. 1, § 9. Horne's Int. vol. 1, 163. President Van Buren's An. Mess. 1837. Gardner's Moral L. Nat. 204. Vattel, B. 3, c. 3, § 35. 2 John Jay's L. & W. 385, 389, 395.*)

## STATES DE FACTO.

SEC. 15. States *de facto* may, if permitted by the national government, exist legally for municipal purposes within the limits of the United States; and, when admitted by Congress, they become part of our Union, with all the rights and privileges of our States. Vermont was for a time a *de facto* State. California, by the permission of the President, organized a State government, and put it in full operation in 1849, *ex necessitate*, as Congress had omitted to form any. She sent her constitution to Congress, and asked to be admitted into the Union, and her prayer was granted, and her prior State acts were by relation ratified. (See *Buchanan, Secretary of State's Letter, to Voorhees.*)

In 1850 Congress admitted California as a State, upon the usual condition that the State "shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law, and do no act, whereby the title of the United States to and right to dispose of the same shall be impaired or questioned;" and the State was prohibited from taxing or assessing the public domain of the Union, and from taxing non-resident property higher than that of resident owners; and the act declared, "that all the navigable waters within the said State shall be common highways, and forever free as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost or duty therefor." (*Acts Cong. 1850, p. 452.*)

The courts of the United States in reference to our new States, are governed by the legislative and executive action of the national government. (5 *How.* 343, 378. 14 *Ib.* 38. 7 *Ib.* 39, 43, 44. 5 *U. S. St. L.* 797. 3 *Wheat.* 534. 4 *Ib.* 634.)

#### RIGHTS OF PROPERTY PERTAINING TO SOVEREIGNTY.

SEC. 16. All property in every State and nation must have an owner. Hence, when by the law of any nation or State, any movable or immovable property within its territory has no other owner, it belongs, by right of sovereignty, to such nation or State. This is the settled doctrine of the common and civil law. (*Les Douze Codes*, Paris ed. 1834, § 539. *Code Nap.* Lond. ed. 1827, p. 149, § 539. *Blackst. Com. with n. Ar. & Chitty*, N. Y. ed. 1827, vol. 1, pp. 214—220; m. p. 290—299, n. a. *Domat, Cush.* ed. 1850, vol. 2, p. 130, §§ 2670—2672. 1 *Brad. N. Y. Sur. R.* 129. 4 *U. S. St. L.* 132.)

In our complex government a question may arise as to derelict property found within the maritime curtilage of a State. It would seem that if derelict property is found on the high seas, beyond the territory of any State, that, subject to salvage, it should go to the national treasury, or to such use as Congress shall direct. If such property is rescued on the coasts of a national territory, the same rule ought to prevail. If State jurisdiction covers the place of rescue, then, subject to rights of salvage allowed by the Admiralty, the derelict property ought to go the State treasury. (*Blunt's Com. Dig.* 413—424.)

Where derelict vessels or property are found in tide-waters, or on the waters of the great lakes, salvage may be claimed in our national courts. (3 *Selden R.* 555.)

By virtue of sovereignty in the States and nations of

Germany, the *droit d'aubaine* and the *droit de traction* exist in the shape of a tax on the withdrawal of personal property, which has been inherited by will or succession, or which forms the proceeds of real property inherited in the same manner. In the United States it is generally otherwise. (*Webster's Dip. Pap.* 388, 389.) These laws rest on the same principle as the right to derelict property.

These doctrines pervade all systems of law. By the Indian laws the king succeeded to the estates of his subjects, dying without heirs.

It has become practically settled as a principle of the law of nations, that every national sovereignty owns in trust for relatives the life of every citizen, and may compel any foreign nation to pay the value of any life wrongfully or negligently destroyed by any of its officers, or by those acting under its authority.

#### SOVEREIGNTY, STATE AND NATIONAL.

SEC. 17. The national powers conferred on the government of the Union, the treaties of the republic, the national constitution and acts of Congress, in pursuance of it, are all supreme and sovereign to their full extent. These powers are specific; but among them is one covering a large field: Congress is empowered to pass all laws necessary to carry the specific powers into full effect. The Supreme Court, in deciding the question of the constitutionality of the Bank of the United States, and in other cases, has settled the construction of this power to mean a right in Congress, by law, to select any constitutional means deemed by it necessary to effect a constitutional end, and to employ them. (3 *Story on Const.* §§ 1236, 1237, 1243.)

Our national government is the sole organ and representative of the nationality of our republic in all inter-

course with foreign nations, and its powers are supreme and sovereign to the extent of its constitutional authority.

As a necessary consequence of this doctrine, no foreign State can hold any diplomatic or other governmental intercourse with any State of our Union ; nor can a State law or authority impede the execution of the powers of national sovereignty.

The municipal sovereignty remains with the States and the people respectively. Though the national powers infringe occasionally in their action on slight portions of State municipal law, when the latter gives way to the supreme law of the land, the great mass of governmental powers, the municipal sovereignty reside in and are reserved to the respective States and their people. These are sovereign, and know only constitutional limitations, and those imposed by the legal effect of our treaties and acts of Congress.

Here, then, we have a national sovereignty and a State municipal sovereignty, each moving in separate orbits and producing a common harmony.

As a consequence of this arrangement, no State has any responsibility for the domestic policy or municipal law of another State, and has no right to interfere therein, and ought not to allow its citizens to do so. The principle of the law of nations, that secures entire immunity to every nation from foreign interference in their domestic polity, applies strongly among the States and territories of our Union. The Supreme Court of Massachusetts so decided in the case of Sims, April 1851. The court decided that Sims, being a fugitive slave, and having been arrested by a United States Commissioner, for delivery to his master, pursuant to the acts of Congress of 1793 and 1850, no *habeas corpus* could be issued by a State court to interfere with the arrest and return, authorized by the consti-



tutional acts of Congress. That the decision of the Supreme Court of the United States, in *Prigg vs. Pennsylvania*, (16 *Pet.* 539,) settled the law, and held the fugitive slave law constitutional. (See, also, to same effect, *Graham vs. Strader*, 5 *B. Monroe's R.* 173, 180—182.)

It results from the foregoing doctrines that national sovereignty, as limited by the constitution of the Union, acts upon and for the people of all the States and territories of the republic as one government, and that the States of our Union, in all respects, except so far as they have parted with authority by the constitution of the Union, are State or municipal sovereignties.

From the nature of our government, the States respectively may pass State laws, civil and criminal, to compel its citizens, and others subject to them, to respect all rights guaranteed to citizens of other States, or to residents. The case of *Ells, appellant, vs. The People of Illinois*, decided by the Supreme Court of the United States, December term, 1852, is to that effect.

#### LIMITATION OF STATE SOVEREIGNTY.

SEC. 18. State power is limited to its territory, except so far as the national constitution and compacts provide for extra territorial action, or State laws or acts of Congress may permit within their jurisdiction. (11 *Pet.* 131—137. 14 *Ib.* 568. 1 *McLean's C. C. R.* 348—351.)

#### EQUALITY OF THE STATES.

SEC. 19. All the States of our Union have equal municipal rights. (3 *How.* 224. 13 *Ib.* 26. 9 *Ib.* 235. 10 *Ib.* 93, 94.) All new States are admitted upon an equality with the old ones.

## PERPETUITY OF THE UNION.

SEC. 20. The confederation declared itself a perpetual union of the States. (1 *Calhoun's Works*, 188.) The Constitution of the Union was intended to make it more perfect. (*Ib.* 192.) Hamilton, Madison, Jay, Clay, Webster, and many of our statesmen and jurists, agree that there is no legal and peaceful mode of changing our union, except as provided by the Constitution, and that forcible State secession is rebellion. (Madison's Letters to Alexander Hamilton, to Daniel Webster and to William C. Rives, and 5 *Webst. W.* 361—389.)

Each State has granted all national powers to the Union, and by the compact of the Constitution a perpetual union has been agreed upon, never to be changed by any acts other than those pointed out in that instrument.

## POPULAR SOVEREIGNTY.

SEC. 21. All law in our republic is derived from the people. Hence, all American public law reposes substantially on popular sovereignty.

## MILITARY INVASION BY ONE STATE OF OUR UNION OF ANOTHER.

SEC. 22. In the case of the Commonwealth *vs.* Blodget et al., (12 *Metcalf*, 56—78,) the Supreme Court of Massachusetts decided that the march of a military party from Rhode Island, during the Dorr rebellion, and while martial law was in force in that State, by order of a military commander, into, and the arrest in Massachusetts of Rhode Island rebels, pursuant to such military order, and taking them to Rhode Island by military force, was illegal, as

the authority of Rhode Island was confined to her own territory. The Court declared that the States of our Union have no powers to make war, to contract alliances or make agreements between themselves; that they are not empowered to engage in war unless actually invaded, or in such imminent danger of invasion as to admit of no delay. That no martial movement can be made from one State in aid of another, in case of rebellion, as the Constitution confides to the national government the exclusive power and duty to aid the authorities of the States respectively to suppress domestic insurrections, as well as to protect them from foreign invasions.

The Court say, that though an officer or soldier, acting by the order of the Governor of a State, entering the territory of another State in pursuit of an enemy, or for any other purpose, may claim immunity from the criminal laws of the country, the invasion would be an act of war. That a previous order of the sovereign power of the State, or a subsequent ratification of the acts done in its name, will excuse the subordinates engaged in it. (pp. 83, 84.)

The court also held that Rhode Island had no right to send her soldiers into Massachusetts to capture her rebel citizens, "unless necessary in defence of the lives and property of the citizens of Rhode Island at the time;" and that of that necessity the jury were the judges.

The opinion given in this case by Chief Justice Shaw is distinguished by ability, learning and constitutional accuracy.

The municipal sovereignty of the States of our Union not only entitles them to entire immunity from domestic interference by citizens of other States, as this eminent jurist so forcibly and happily illustrated in deciding upon Sims' case, but it of right exempts every State from mili-

tary or naval invasion from other States of our Union, even in pursuit of fugitive rebels.

It is very clearly the duty of the President of the United States to prevent forcible or armed invasions of our States or territories by the people of other States and territories of our Union, and he is as much bound to employ the military and naval power of the republic to put down and entirely arrest such invasions as those by foreign enemies. The forcible invasion of Kansas by the Missourians, and conquest of the political, personal and property rights of the people, in 1855 and 1856, was a great wrong, that the President was slow to arrest.

SEC. 23. A State may declare martial law to put down a rebellion, but its effect is confined to its own limits. (7 *How.* 45.) Military officers, executing such law by arresting a party, by virtue of an order of his superior officer, pursuant, on the face of it, to such State law, and acting in good faith, are protected by it from action by any party so arrested and imprisoned. (1 *Curtis C. C. R.* 308.)

#### UNITED STATES PRIORITY.

SEC. 24. In the national government, by law, a prior right of payment exists in certain cases. It is a right of sovereignty enforced by acts of Congress. (1 *Kent's Com.* 5th ed. 244—247. 1 *U. S. St. L.* 263, § 18, n. a. p. 518, § 5, p. 676, § 65. 1 *Pet.* 386. 10 *Ib.* 590, 611. 4 *Ib.* 291.)

The right of the United States to prior payment attaches, 1. In case of the death of the debtor without sufficient assets to pay his debts; 2. Of bankruptcy or legal insolvency, manifested by some act pursuant to law; 3. Of a voluntary assignment by the insolvent of all his property to pay his debts; 4. In case of an absent, concealed or

absconding debtor, whose effects are attached by due process of law.

Such priority does not overreach any lien on or specific right in the debtor's property, which accrued prior to such act. (10 *Pet.* 596. 4 *Wheat.* 108. 1 *Comst. N. Y. R.* 201. 1 *Pet.* 439. 8 *Ib.* 271.)

In *United States vs. Hack and others, assignees*, (8 *Pet.* 271—276,) the Supreme Court of the United States held that the priority given to the government does not overreach any lien created by law, or any *bona fide* transfer of property in the ordinary course of business, and this right of prior payment of debts to the United States is not a lien, but is confined to the general funds of the debtor in the hands of an assignee; and that, where the debtor is a member of an insolvent firm, and the partnership property is not sufficient to pay the partnership debts, the interest of each partner in the partnership property is his share of the surplus after payment of the firm debts, and that surplus only is liable for the separate debts of each partner; and that the government right to prior payment, like that of a private creditor of the firm, is subject to the partnership debts.

#### PRIVILEGES OF SOVEREIGNTY.

SEC. 25. The United States and our State governments have certain exemptions on account of sovereignty, not on account of dignity merely, but for the benefit of the people, whose aggregate and individual rights are placed, by our national and State constitutions, under their guardianship and protection. Hence no prescription or statute of limitations runs against the United States, unless specially authorized by act of Congress; or against a State, unless a statute thereof shall so enact. (18 *Johns. R.* 229, 230. 4 *Mass. R.* 522. 2 *Mason R.* 311. 3 *Pet.* 12. 10 *How. U. S. R.* 511.)

No franchise or governmental power, or property, real or personal, can be claimed by individuals or corporations, though a long period of use and usurpation may have existed. (*Ib.*) The actual grant must always be shown to use a public franchise, or the exercise of it is a usurpation, as it is not a matter of private right. (8 *How. U. S. R.* 581, 595, and 23 *Wend.* 554.)

Nor can a suit be brought against the United States, or any State, unless their respective laws allow and prescribe, except that one State may sue another in property matters.

The reason of these privileges of sovereignty are based upon the principle of popular sovereignty, and that the powers of government must remain in officers of government, State and national, as distributed by their respective constitutions among their different departments, without diminution, assignment or deputation. Hence neither the legislative, judicial or executive departments of the United States, or of any State, can legally abnegate any constitutional power, or assign or depute it to any other body.

Though no suit can be brought against a State of our Union, except by another State or by a foreign State, a State may, in another State court, be admitted a defendant to protect its rights, but not to enforce a decree against it. (*Const. U. S. & Am.* 1 *Barb. Ch. R.* 163, 164.)

## CHAPTER II.

OF THE CESSION OF TERRITORY OF NATIONS; OF STATES DE FACTO; OF THE UNION AND DIVISION OF NATIONS, OF OUR STATES, AND THEIR CONSEQUENCES.

SECTION 1. Any two or more nations may, by the solemn assent of their respective people, in whom resides the national sovereignty, unite and form one sovereign State. The form or the mode by which the national will is to be expressed must be according to the internal constitutions of the uniting nations. One way of effecting this union is by the formation of a compact, bringing two or more States together, as sovereign States, agreeing by treaty to the creation of a new State and a new sovereignty. Another mode is by a cession by one nation of its sovereignty and national character to another, by simply adding the territory of the ceding State to that of the other nation, whose sovereignty remains unchanged, though her dominion is enlarged. In the first case the former sovereignties are destroyed by the act of union, and merged in the newly-formed State. The union of England and Scotland, under the name of Great Britain, in 1707, is, perhaps, an example of a mode of creating a new nation in effect; and the cession of the sovereignty of Texas to the United States of America, in 1845, presents a case of the merging of the national existence of one State in that of another. After the revolutions of Belgium and France of 1830, a union of Belgium to France was proposed, and Lafayette gave the following opinion on the right of uniting with Belgium:

“As to the union of Belgium with France, I would not have stopped to inquire whether it would be displeasing to this or that power. I would only have asked whether it was the will of a majority of the Belgians to effect, and the will of the representatives of the French nation to accede to the union.” This is a high French authority for our doctrine—the sanction of the great and good Lafayette.

As nations may, by the intervention of their executives, or of them and legislative assemblies, duly authorized by the respective constitutions of States, or vested with the necessary power by the body of each nation, may, according to Grotius and Vattel, cede all of the national sovereignty and domain to another, it follows that a part may be ceded. A permanent right of fishing may be ceded as appurtenant to the territory of the acquiring State. The mode of the grant is controlled by the internal constitution of each State, and by it the necessary officers to do the act must be ascertained.

The Supreme Court of the United States have decided that the Constitution of the United States confers on the national government the power of making war and treaties, and, by consequence, the power of acquiring territory, either by conquest or by treaty. (1 *Peters' U. S. R.* 542, 571.)

By treaties and by the revolution, our republic has spread its jurisdiction over a territory of about three millions three or four hundred thousand square miles, extending from the St. Lawrence to the Rio Grande, and from the Atlantic Ocean to the Pacific. This vast country is an asylum for the people of all nations.

The assent of nations to receive a cession from another State must be given by the Executive and Senate, or by the Executive and Congress, or by the Prince, or by the Prince and Council, according to the respective constitutions of nations.



In our republic it is settled that foreign territory may be constitutionally annexed to the United States, and that Congress may govern it until States of the Union are formed out of it. When Florida was ceded to our republic in 1819, by Spain, the same course was pursued. In the case of the Republic of Texas, the assent to annexation was given by the President and Congress of the United States, and Texas having ceded her sovereignty in 1845, she became part of our republic. The practical construction of our constitution as to the mode of admitting a foreign State or a part of its territory and people, must be considered as finally settled. This view of the subject is supported by the decision of the Supreme Court of the United States in the case of the American Insurance Company, et al. *vs.* Canter, (1 *Peters' U. S. R.* 542.) The court decided the annexation of Florida to be legal, and that Congress had a general legislative authority over the territory.

Chief Justice Marshall, in giving the opinion of the court in that case, said: "The Constitution confers absolutely, on the government of the Union, the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty." He then proceeds to say, that such conquest or cession only affects the political relations of the inhabitants of the conquered or ceded territory.

SEC. 2. The power of a nation to mortgage a part of its public domain, or the whole of it, of necessity, according to Vattel and Grotius, belongs to every nation, and may be exercised by the executive or the executive and other officers to whom, in any nation, the power to cede and mortgage the national territory is confided. Many instances of national mortgages have occurred in Europe. The provinces of Rousillon and Cerdagne were mortgaged

by King John the Second. A Mexican mortgage of one hundred millions of acres of public domain was made in 1837 to British subjects.

A mortgage by a nation to another, pursuant to its elementary law, and with the assent of the people occupying the mortgaged territory, if specific, and giving exact metes and bounds, is a national valid security.

Payment discharges such a debt and the lien of the mortgage. A tender of the debt, and interest within a reasonable time after the period fixed for payment, ought also to be held to discharge it.

If a national mortgage, made to secure a debt to another nation or its citizens, is not paid when due, the mortgagee nation may take possession of the mortgaged domain and retain it, unless payment is made in a reasonable time. By the common law, in case of private mortgages, twenty years possession of a mortgagee is held to bar a redemption by the mortgagor. (2 *Story Com. on Eq. Jurisp.* 2d ed. p. 295, § 10, 28 a.) From analogy, we would say, that when a national mortgagee has held possession of a mortgaged territory for twenty years after failure of payment and after possession taken, the title of the mortgagee nation may well be deemed perfect, and the mortgage converted into a cession.

SEC. 3. The division of a sovereign State into two or more nations may be made with the assent of the people composing such State, as every nation has the inherent right to abolish or modify its government, as to its citizens seems most conducive to their happiness. We have before explained this inherent right.

The formation of two or more States out of one nation ought, upon that principle, to receive the sanction of a majority of the people of such nation, expressed by their delegates in convention, or by some equivalent expression of popular will.

In our Union a State may be divided by an act of its legislature, assented to by act of Congress, but not otherwise. (*Const. U. S.* Art. 4, § 3.)

In monarchies, absolute or limited, a cession of national territory, or the division of the nation into two or more kingdoms, ought to receive the assent of the people affected, in the mode sanctioned by the internal constitution of the nation, and in a mode as near as practicable to the mode above prescribed. (*Vattel*, B. 1, c. 21, § 263.)

The mode of ascertaining the national will must, of necessity, differ in different countries, according to their forms of government and degree of cultivation. The English barons at Runnymede, who, in 1215, extorted the Magna Charta from King John, may well be considered as the rude exponents of the will of the English nation, and the incipient founders of English liberty, without intending any thing beyond the protection of the nobility against royal tyranny. To each nation, then, belongs the inherent power of division and of regulating the mode in which the national assent shall be given in the creation of two or more sovereign States out of one.

SEC. 4. Sovereign States, according to Vattel, may be increased in territory, or they may be divided by the arms of a foreign State or of successful insurgents. Morally speaking, there can be no right, national or individual, founded on force. All nations, like individuals, have a natural right of self-defence and of conquest of an enemy's territory in wars of self-preservation. But, in such case, the law of nations, in accordance with the law of God, should decree that such conquests should be held simply to indemnify the assaulted and injured nation for injuries suffered, and for the expenses of such defensive wars.

In short, according to sound ethics, all acquisitions of a State ought to be by agreement. Such has been the

policy of our republic, even in our acquisition by treaty and fair purchase of Mexican territory, and such it will continue to be.

The law of nations, as universally assented to, according to Grotius and Vattel, sanctions the general principle, that territory may be acquired by a nation by conquest as well as by treaty. Chief Justice Marshall thus declares the law of nations as understood by the Supreme Court of the United States: "After, therefore, a completed conquest, the conquered territory is *de facto* a part of the victorious nation." Speaking of such military conquest, the Chief Justice says, that if the subdued territory "be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose."

If a portion of the territory, or a colony of any nation, be conquered by successful armed resistance of the insurgent inhabitants, asserting their national independence, and claiming to form one of the family of nations, the nation *de facto* thus organized, must be deemed to have complete and perfect territorial rights as any other victorious nation would have obtained by complete military conquest.

By successful force Vermont repelled the jurisdiction of New-York, and in 1790 her independence was acknowledged, and in 1791 she was admitted into the Union. (1 *Kent's Com.* 4th ed. 178.)

The law of nations regards and regulates only the rights and duties of sovereign States in fact existing; and it does not inquire beyond the *de facto* existence of a nation. The only matter of fact inquired into is whether a nation is independent and capable of self-government,

and what is its actual territory. With a nation thus constituted, other States hold international relations.

If a nation is divided by force of arms, or by agreement, into two or more States, actually organized and independent, each State becomes a sovereignty. (*Grotius on P. & W. B. 2, c. 9, § 8.*)

SEC. 5. Upon the principle above stated, many nations of Europe, after their territories were divided or enlarged, or their ruling dynasties were changed, in 1814 and 1815, without the consent of the nations interested, by the imperial and arbitrary decrees or treaties of the Congress of Sovereigns at Vienna, still remained *de facto* States, where sovereignty was left by the pruning hand of royalty. The same is true of all other States changed by royal edicts of the allied kings.

Conquered territory *de jure*, belongs to the victorious States and nations, and nations owing their origin to the unauthorized and forcible intervention of foreign nations, when completely organized, become members of the great family of nations, and sovereign States *de jure* as well as *de facto* in every respect.

SEC. 6. Nations *de facto* are of necessity nations *de jure*. An association of men claiming to be a nation must be a nation or it is not. If it is in fact an organized, independent and sovereign State, as one of the family of nations it acquires all international rights and is subject to all international duties. (*Vattel, B. 3, c. 5, § 68. Ib. B. 2, c. 7, § 84. Rush's Res. at Court of London, pp. 413, 441. Wheat. Hist. L. N. 79, 291—293, 546, 623. Wheat. Int. L. P. 1, c. 2, § 12.*) It is a fact to be ascertained by proof. Hence it is the custom of our republic to send agents to investigate the facts and report upon the solidity of the new State, and its capability of performing its duties as one of the community of nations. If the report is favorable, a formal recognition follows, simply as an attesta-

tion of the fact of the actual organization and existence of such new sovereignty. And this recognition of new States, growing out of successful rebellion of insurgent inhabitants, asserting by force their inherent right of self-government, is constantly given without waiting for the prior recognition of the parent State, or for the cessation of the war of revolution. The Netherlands, our Republic and many nations have been so recognised.

The same principle is set forth by President Monroe, in his Message to Congress of March 8th, 1822, recommending the acknowledgment of the new Spanish-American States; by John Quincy Adams, in his reply to the protest of the Spanish Minister against such recognition; and in the instructions to Mr. Anderson, Minister to Colombia in 1823; by President Adams, in his Message to Congress in March, 1826, on the subject of the Congress of Panama; by President Polk, in his annual Message to Congress in 1845; by Adams, Webster, Calhoun, Buchanan and Upshur, as Secretaries of State. Mr. Adams said: "Our doctrine is founded upon the principle of inalienable right." This doctrine was properly applied to Texas; and, after she had long been a complete nation, at her urgent request, she was admitted a State of our Union.

This is a well-settled principle of public law. Vattel asserts, and European and American nations concede, this principle of the law of nations, and henceforth it must be deemed settled.

#### PARTITION OF NATIONS.

SEC. 7. The power to grant territory necessarily implies authority to define its boundaries and appurtenances.

The partition treaty of 1783, between our republic and Great Britain, defined the American part of the territory and its appurtenant common right of fishery on the

coasts of British America. Hence, the war of 1812 did not divest either our exclusive title to the territory or to that fishery. The people of New-England discovered the fisheries, and first used them and made them productive. They defended them, aided by the mother country, prior to our Revolution. John Adams, one of our commissioners who negotiated the treaty of 1783, in a letter published in *Niles' Register*, (v. 23, p. 25,) says, that the article relating to our common right to the fisheries was insisted on by them as a right in the people of the United States "to every branch of the fisheries, and to cure fish on land," in common with the people of Canada and Nova Scotia, founded on discovery, first use and defence in war by New-Englanders. (See, also, *Ex. Doc. For. Rel.* v. 4, pp. 365—368, 406. *Wheat. Int. L. P.* 3, c. 2, § 9. 8 *Wheat. R.* 492—494. 12 *Ib.* 523.)

Where any similar partition treaty is executed, the territory and appurtenant rights become vested, and a subsequent war would not divest them, as war annuls only transitory treaties, and not permanent ones. (*Ib.*)

The history of our treaties of 1783 and 1818, relative to the fisheries, shows that the treaty of 1783 was a permanent one, and so meant to be. (4 *Sparks' Dip. Cor.* 342, 343. *Niles' W. Reg.* v. 23, p. 25. 3 *J. Adams' W.* 356, 357.) Our fishery treaty of 1818, relative to the fisheries, stands on the same basis. (*Wheat. Int. L. P.* 3, c. 2, § 9. *Ex. Doc. For. Rel.* 365, 368, 406.) The convention of 1818 was not meant to be, and was not understood to be, a treaty of cession, but a practical regulation of an existing common right of fishery for the convenience of both parties.

The true construction of our fishery treaty stipulations has been well explained by John Quincy Adams, who was Secretary of State in 1818. He says:

"The convention restricts the liberties in some small



degree; but it enlarges them, probably, in a degree not less useful. It has secured the whole coast fishery of every part of the British dominions, except within three marine miles of the shores, with the liberty of using all the harbors for shelter, for repairing damages and for obtaining wood and water. It has secured the full participation in the Labrador fishery, the most important part of the whole, and that of which it was at Ghent peculiarly the intention of the British government, at all events, to deprive us. This fishery cannot be prosecuted without the use of the neighboring shores for drying and curing the fish. It is chiefly carried on in boats to the shores, and the loss of it, even if the rest had been left unaffected, by the same principle would have been a loss of more than half of the whole interest. The convention has also secured to us the right of drying and curing fish on a part of the Island of Newfoundland which had not been enjoyed under the treaty of 1783. It has narrowed down the pretensions of exclusive territorial jurisdiction, with reference to those fisheries, to three marine miles from the shores. Upon the whole, I consider this interest, as secured by the convention of 1818, in a manner as advantageous as it had been by the convention of 1783. We have gained by it, even of fishing liberties, as much as we have lost; but if not, we have gained practically the benefit of the principle that our liberties in the fisheries, recognised by the treaty of 1783, were not abrogated by the war of 1812."

The treaty of 1818 will be found in *Niles' Weekly Register*, v. 15, p. 434.

The treaties of 1783 and 1818 must be construed together, and with reference to the facts and rights claimed as permanent by Americans at their date. It must be considered that the first, by our government, has been held a recognition of territory and permanent appurte-



nant rights of common of fishery; and the second, a regulating treaty, modifying their existing rights merely.

As to the Bay of Fundy, the Americans have a right to its fisheries, independent of treaties, as appurtenant to our territory, which borders a part of it. But the treaty of 1818, as well as that of 1783, guarantee it to us.

The fishery difficulty has been finally settled by the treaty of our republic with Great Britain of June 5th, 1854. (10 *U. S. St. L. Trea.* p. 199.)

By the first article it was stipulated that, "in addition to the liberty secured to the United States, fishermen, by the above-mentioned convention of October 20th, 1818, of taking, curing and drying fish on certain coasts of the British North American colonies, therein defined, the inhabitants of the United States shall have, in common with the subjects of her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbors and creeks of Canada, New-Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore—with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coast, in their occupancy for the same purpose.

"It is understood that the above-mentioned liberty applies solely to the sea-fishery, and that the salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, are hereby reserved, exclusively, for British fishermen." The residue provides for settling disputes.

Article second stipulates that "British subjects shall

have, in common with the citizens of the United States, the liberty to take fish of every kind, except shell-fish, on the eastern sea-coasts and shores of the United States north of the 36th parallel of north latitude, on the shores of the several islands thereunto adjacent, and in the bays, harbors and creeks of said sea-coasts and shores of the United States, and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the islands thereof, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States, in the peaceable use of any part of the said coasts, in their occupancy for the same purpose.

“It is understood that the above-mentioned liberty applies solely to the sea-fishery, and that salmon and shad-fisheries, and all fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.”

SEC. 8. We come now to inquire what consequences follow the changes by union and division of States and nations.

In case two or more nations unite and form a new sovereign State, the old sovereignty is thereby merged in the new one and lost. Hence, all executory treaties of the merged sovereignties are abrogated by the destruction of one of the contracting parties. As all international relation ceases as to the merged States, of necessity all treaties regulating their rights and duties, and those of other States to them, are superseded by the act of union and the formation of a new sovereign State. To this rule there are some exceptions. (*Vattel*, B. 2, c. 13, § 203. *Wheat. Hist. L. N.* 311, 313. 8 *Wheat.* 492—494.) All treaties regulating and fixing boundaries, and all appurte-

nant rights, as fisheries, like those of Newfoundland and its vicinity, appurtenant to the United States, and all conventions or agreements by any such uniting State, for the payment of any debt to any foreign State or the citizens of any such foreign State, are binding on the new nation formed out of the uniting States. (*Grotius on P. & W.* B. 2, c. 9, §§ 8, 9, 10; c. 16, § 16. *Vattel*, B. 2, c. 1, §§ 216, 217.) Upon the same principle, every just obligation of any such uniting State, to pay foreign States or their citizens for injuries done by the government *de facto*, or citizens of such uniting State prior to such union, becomes, by the act of union and the formation of a new sovereign State, the debt and duty of the latter by the law of nations. (*Wheat. Hist. L. N.* pp. 546, 547. *Wheat. Int. L.* P. 1, c. 2, §§ 16—25.) This result follows irresistibly from the principle of common sense and public law, that the vested rights of foreign nations are not affected by any changes in the government or internal constitution of a nation.

These principles were recognised by the allied sovereigns of Europe by article 6 of the protocol of 1814, decreeing the union of Belgium with Holland, and making the debts of the two countries a common national debt of the kingdom of the Netherlands. (*British Ann. Reg.* vol. 74, p. 318. *Wheat. Hist. L. N.* pp. 538—555.) John Quincy Adams, Secretary of State of the United States in 1818, in giving the President's instructions to Mr. Everett, our representative at the court of Holland, asserts the same doctrine. He says: "No principle of international law can be more clearly established than this, that the rights and obligations of a nation in regard to other States are independent of its internal revolutions of government. It extends even to the case of conquest." *Vattel* lays down the same rules of public law on this subject. (B. 2, c. 13, § 203. *Grotius on P. & W.* B. 2, c. 16, § 16.)

SEC. 9. A division of a nation into two or more sovereign States, with an abandonment of the old sovereignty and the formation of a new one, has no effect on the vested rights of foreign States or their citizens. (*Wheat. Hist. L. N.* pp. 79, 546, 547.) All such vested rights attach *pro rata* to and become the debts, duties and obligations of the new nations, and they are bound to discharge them. All treaties, except those above stated, surviving a union of two or more States, cease with the existence of the State contracting them, upon the principles before explained. (See ch. 12.) All just national liabilities for foreign debts, or injuries to foreign nations or their citizens, prior to the dissolution of the old nation, are, by its division into several nations, transferred to and charged upon them, *pro rata*, by the law of nations. Upon this principle the Ministers of Great Britain, France, Russia, Prussia and Austria, proceeded in the articles agreed upon June 26th, 1831, at London, for the separation of Holland and Belgium. (*British Ann. Reg.* vol. 73, p. 384.) The 12th article was in these words: "The division of the debt shall be made in such manner that the whole of the debts before the union shall fall upon 'the country by which they were contracted, and those contracted since the union shall be divided in a just proportion." (*Wheat. Hist. L. N.* 553.) The principles laid down as to the union of States apply to their division, in the mode above explained. No nation can get rid of the existing right of any foreign State by dissolving the old sovereignty and forming a new one. If two men buy a farm already mortgaged and divide it, each must, of course, pay his proportion of the mortgage.

SEC. 10. If, however, the old sovereignty remains, though a new State or States may be formed, by agreement, by victorious rebellion or by conquest, out of part of its territory, as in the case of the United States, the

Spanish-American republics and the kingdom of Greece, the parent nations retain all existing treaty and other national rights, except as to the enfranchised territory, and they continue subject to all national duties and obligations. The new States are subject to none of the duties and obligations of the parent State, the new States acquiring their territory, with its boundaries, fisheries, if any, and all the rights appurtenant to the same, as they existed at the time of separation. (*Vattel*, B. 2, c. 13, § 203.) If a valid mortgage on the public domain, or the public property and jurisdiction, existed at the separation, in favor of foreigners, it would still continue until paid, upon the principles above illustrated.

SEC. 11. In case of cession of part of the territory and jurisdiction of one nation to another, all jurisdiction and rights of the ceding State of every sort pass to the acquiring State, as they exist at the time of cession.

SEC. 12. By the law of nations, conquest passes all rights belonging to the conquered territory to the same extent as cession. In neither case is private property affected. The rights of sovereignty and of public property only pass by a cession or conquest. (*Dip. Cor.* vol. 2, pp. 237, 238. 9 *Pet. U. S. Rep.* 133, 734. 8 *Ib.* 445. *Vattel*, B. 3, c. 13, § 200. *Wheat. Int. L.* P. 4, c. 2, §§ 6, 7.) The Supreme Court of the United States have so declared the law of nations. (12 *Pet.* 436.) In *Delassus vs. United States*, (9 *Pet.* 133,) the court say: "Independent of treaty stipulations this right should be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property." (See 7 *Pet.* 734, and *Vattel*, to same effect.)

The transfer of the sovereignty of ceded territory is completed by the actual transfer of possession, and a pub-

lic act of the acquiring State extending its sovereignty over it. (1 *Kent's Com.* 2d ed. 177.)

SEC. 13. In case the territory of a State or nation, in whole or in part, is conquered by or ceded to, or united by treaty with another nation, the municipal laws of the conquered, ceded or united nation remain in full force until legally changed by the legislative power of the acquiring nation, agreeably to its elementary law and constitution. In *Rex vs. Vaughan*, (4 *Burr.* 2500,) in the Court of King's Bench, Lord Mansfield, in giving the opinion of the court, said: "If Jamaica was considered as conquest, they would retain their old laws till the conqueror had thought fit to alter them." In the case of the *American Insurance Company et al. vs. Canter*, (1 *Pet.* 542,) the Supreme Court of the United States, speaking of the people and territory of Florida, transferred by treaty to our Union, say: "On the transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly-created power of the State." In *Strother v. Lucas*, (12 *Pet.* 436,) speaking of the cession of Louisiana and its people to our Union, the Supreme Court say: "That by the law of nations, the municipal laws of a ceded or conquered country, existing at the time of cession or conquest, whether in writing or evidenced by the usages or customs of the conquered or ceded country, continue in force till altered by the new sovereign." (See, also, 2

*Merivale's R.* 159, 161. 1 *Kent's Com.* 178, n.) In pursuance of this well-established doctrine, Mr. Clayton, Secretary of State of the United States, in his instructions to Mr. King, agent of the government, sent to California, declared the Mexican municipal laws then in force in California. The same is true, and it was so held by President Taylor and his Secretary of State in reference to New-Mexico. Henry Clay maintained this doctrine in the Senate, in relation to California and New-Mexico.

In *Fowler vs. Smith*, (2 *California R.* 489,) it was held by the Supreme Court of California, that though by the law of nations the municipal law of a conquered or ceded country remains until changed by the new sovereignty, such change may be effected by the general customs of the people emigrating to and possessing the newly-acquired territory under the acquiring power, and carrying with them the laws and customs of their own country, as in case of California, and the former Mexican law, governing a sparse population, may be deemed superseded unless generally adopted. It would seem reasonable that the customary law of a free people, speaking our language and forming a large majority, should prevail over foreign laws, unknown and concealed in a foreign language.

From the nature of the case, the municipal laws of a conquered or ceded country must remain until changed by the legislative power of the acquiring State, in the mode prescribed by its constitution and laws. The laws securing property, its descent and alienation, and for the protection of life and liberty, must be definite; and every change of them must be of necessity by public act or law, announcing officially every repeal or modification of those laws.

In the United States, our acquisition by treaty of Louisiana, Florida, California and New-Mexico, have given rise to many questions of public law. It is settled, that



the municipal law of ceded territory remains until legally changed. A general municipal jurisdiction over conquered or ceded territory is vested in Congress, and Congress may repeal or modify the foreign municipal laws of such acquired territory. In the case of the Cherokee Nation *vs.* Georgia, (5 *Pet.* 44,) the Supreme Court of the Union decided that the power conferred on Congress to make "all needful regulations and rules respecting the territory of the United States, confers on Congress a plenary jurisdiction over all the territories of the republic." The court say: "Rules and regulations respecting the territory of the United States; they necessarily include complete jurisdiction."

In this respect there is no distinction between original territories and those acquired by treaty or conquest. (1 *Pet.* 542. 4 *Wheat.* 422. 5 *Pet.* 44.)

It is upon this settled doctrine of the plenary power of Congress over all our territories, that Congress has organized territorial governments and limited their powers, from the passage of the ordinance of 1787 down to the present time. (1 *U. S. St. L.* 50, 51.) In 4 *Wheat.* 422, the court say: "All admit the constitutionality of a territorial government, which is a corporate body."

In 11 *Pet.* 317, the court say: "A uniform exercise of an important legislative power by a State for half a century is no unsatisfactory evidence that the power is rightfully exercised." The same rule, of necessity, applies to the general legislative power over territories exercised by Congress. Besides, the laws of the States are confined to their respective States, and, *proprio vigore*, they are of no force beyond. Congress is the only legislature for our territories.

If Congress, by act, organizes a territorial government, its powers are limited by the law of Congress, and a territorial legislature cannot make any law unless the power



is so conferred upon it. A territorial legislature may pass such laws as Congress authorizes. Hence, if so empowered, a foreign municipal law in a territory may be repealed or modified by a territorial legislature.

When a State is duly organized in a territory of the Union, and admitted by Congress, pursuant to the third article of the national constitution, then a plenary municipal jurisdiction within its limits belong to it, and its legislature, unless restricted by the constitution or by treaty, may repeal or modify any foreign or territorial law before existing. This is an admitted doctrine.

When Texas was admitted into our Union she remained subject to her own municipal authority and laws, except so far as they were in conflict with the Constitution of the United States.

In California, the people having organized a State Constitution and ratified it, proceeded, with the approbation of President Taylor and his Cabinet, to appoint State officers, senators and representatives to Congress, and to pass all necessary State laws to put the excellent constitution of California into complete effect. Governor Burnett recommended this course, on the ground of similar precedents in organizing the States of Michigan and Wisconsin. This constitution was communicated to Congress by President Taylor, with a recommendation that it should be ratified, as the people of the new State had a right to regulate their own municipal law. The admission of California by act of Congress by relation, made valid all acts of the new State, though prior in point of time. California, not having been provided with a territorial government by Congress, was of necessity compelled to organize a State government for her own happiness and prosperity.

Prior to such ratification, the State of California, as to its own municipal laws and its internal action, was a State

*de facto*, founded by its own people; and its legislature might pass valid laws, repealing or modifying at its pleasure the Mexican municipal laws. This doctrine results from our system, by which it is affirmed that all power emanates from the people, and that all State municipal authority resides with the people of the States or their respective legislatures. Besides, the municipal acts of a government *de facto* are good and valid of necessity, provided the power of Congress and the property of the United States are not invaded or interfered with. By the law of nations the treaties of a government *de facto* are valid, and its existence and acts are recognised as national. This rule applies to our States situated like California before admission as a State of the Union, for State purposes, though waiting the approval of its constitution by Congress.

SEC. 14. In our republic, the national government, in admitting Texas as a State of our Union, has declared that, though Texas was permitted to cede to our Union all of her fortifications, her national jurisdiction and sovereignty, and be converted into a State, with municipal State powers, she should retain her public lands and pay her own debts. (5 U. S. St. L. 797.) The United States received a cession of Texas with the right of settling all questions of boundary for Texas, and of organizing, with her assent—not to exceed four—new States within her territorial limits, in addition to the State of Texas, when the population should be sufficient; the States so formed, north of 36 degrees and 30 minutes of north latitude, to be free States, and those formed of territory south of that line, called the Missouri Compromise line, to be admitted with or without slavery, as the people of the State asking admission should desire. And the resolution admitting Texas declares that the United States will, in no event, be liable for the debts of Texas. (*Ib.*) Now, as a State of our Union can be sued by a foreign

State in the Supreme Court of the United States, and its property can be levied on to satisfy any debt of a foreign nation ; and as any foreign nation may take assignment of any debts due its citizens from Texas, or any other State of our Union, and prosecute them before that court, no exception can, perhaps, be taken to the disclaimer of our national liability for the debts of Texas. In ordinary cases, however, where the whole national property and jurisdiction are ceded to another nation, the latter is justly liable for her debts.

SEC. 15. In case of a division of any State of our Union, the rule applied by public law to dividing nations, of an equitable *pro rata* division of the national debt, applies to the States of our Union. It is a principle of natural equity.

If a union of two States were to be constitutionally effected, their State debts would, on the same principle, be consolidated.

SEC. 16. When a State is added to our Union, it becomes at once chargeable with our national debt, not as a State, but as a part of the Union. This is the national rule of public law. Our ordinance of 1787 provided, in admitting the States northwest of the Ohio River, that the new States should be subject to pay a part of the Federal debts, contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States, under the articles of confederation. The same principle formed a condition of the cession, by North Carolina to the United States, of the territory now forming the State of Tennessee. (1 *U. S. St. L.* 106—108.)

SEC. 17. In our Union, when new States are formed out of old ones, or out of territories of the United States, or

part of one State is ceded to another by a State compact, sanctioned by act of Congress, the change of municipal sovereignty does not affect private rights in the soil, but these remain unchanged. (1 *Wheat. R.* 279, 281. 7 *Pet.* 87.) In such cases, State rights appurtenant to the soil pass to the new or acquiring State.

SEC. 18. A new State, when it adopts a constitution, and is admitted by Congress into the Union, fixes, by its constitution or law, the day when the State government shall go into effect; and, from that day, all municipal laws before in force, and laws of the United States not incorporated with its constitution and State laws, cease, and the State becomes subject to its own municipal laws, to the Constitution of the Union, and national acts of Congress and treaties. All territorial laws or acts of Congress for its government as part of the territories of the Union, are superseded by the State government. The Supreme Court of the United States so decided, (10 *How.* 93, 94,) holding that the ordinance of 1787, adopted by act of Congress in 1789, was superseded, so far as it was municipal, in Ohio, by the organization of that State.

SEC. 19. American public and private international law form part of the elementary law of our Union, without special adoption by a State statute or constitution.

SEC. 20. The Constitution of the United States displaced the confederation, and actually went into operation on the first Wednesday in March, 1789. (5 *Wheat.* 420, 424.)

SEC. 21. The principle of the law of nations, which continues the municipal law of a ceded or conquered country until changed or superseded by the legislation of the new or acquiring State, enacted for that purpose, has been declared a part of American public law in relation to State organizations, and to apply as well to the com-

mon or unwritten law as to statute law. (12 *Pet.* 614. 1 *U. S. St. L.* 106—108. 5 *How. U. S. R.* 81. 14 *How.* 227. 2 *Iredell's N. C. R.* 350. 1 *Pet.* 542.) Our acts of Congress declare the same doctrine. (2 *U. S. St. L.* 245, § 2 ; p. 248, § 4 ; p. 285, § 7 ; p. 286, § 11.)

In ceding Tennessee, North Carolina expressly provided for the continuance of her laws until they should be duly repealed or modified—a provision merely declaratory of American public law. (1 *U. S. St. L.* 106—108.)

In all cases of establishing new States, an act of Congress is passed to declare the extension of the laws of the United States to them. (3 *U. S. St. L.* 390, 502.) In all civilized countries, all changes of municipal law must be made, of necessity, by some written or printed law, enacted for the purpose, and promulgated publicly and officially for the government of the people affected by it.

Upon these principles the national Supreme Court held, that the admission of Texas into our Union did not subject the people of that State to the United States revenue laws until, by act of Congress, they were expressly extended to them. (14 *How.* 227.)

In *Benner et al. vs. Porter et al.* (9 *How.* 235,) the Supreme Court of the United States, in giving their opinion, say: "That Congress, in the exercise of its powers, in the organization and government of the territories, combines the powers of both of the Federal and State authorities.

The court held, in that case, that by the admission of Florida as a State, by act of Congress, March 3d, 1845, the territorial government was displaced, and abrogated every part of it; and that no power or jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the Federal constitution and laws of Congress, and especially that no jurisdiction continued in federal cases until Congress in-

terfered, and extended the judicial system of the Union over it.

The court held, in this case, that the admission of Florida brought it, as a State, under the Constitution of the United States, and displaced the Federal territorial courts, and that the State judiciary alone remained, until Congress should, by law, establish Federal courts, under the constitution.

This case also decided, that the act of Congress, extending the laws of the Union over it, fixed the period of their power within said State. Also that judicial proceedings in the territorial courts can only be transferred to the new Federal and State courts, according to the acts of Congress and State laws regulating the same, according to their municipal or national character.

#### CESSIONS OF TERRITORY TO OUR REPUBLIC.

SEC. 22. We have shown that the original territory of our Union was secured to the United States by the treaty of peace with Great Britain; and that cessions by France, Spain and Mexico, for full and fair considerations, have added to it Louisiana, Florida, Texas, New-Mexico, California and Arizona. American public law and policy convert all territorial acquisitions, as soon as practicable, into States of our Union, upon terms of entire equality with the original States. Extension of American territory extends free institutions and self-government. It is a benign operation, and is a settled principle of American policy. President Pierce, in his Inaugural Address, thus declares his views on this subject:

“ One of the most impressive evidences of that wisdom is to be found in the fact, that the actual working of our system has dispelled a degree of solicitude which, at the outset, disturbed bold hearts and far-reaching intellects.

The apprehension of danger from extended territory, multiplied States, accumulated wealth and augmented population, has proved to be unfounded.

“The stars upon your banner have become nearly three-fold their original number; your densely populated possessions skirt the shores of the two great oceans, and this vast increase of people and territory has not only shown itself compatible with the harmonious action of the States and the Federal government, in their respective constitutional spheres, but has afforded an additional guarantee of the strength and integrity of both.

“With an experience thus suggestive and cheering, the policy of my administration will not be controlled by any timid forebodings of evil from expansion. Indeed, it is not to be disguised that our attitude as a nation, and our position on the globe render the acquisition of certain portions, not within our jurisdiction, eminently important for our protection; if not in the future, essential for the preservation of the rights of commerce and the peace of the world.

“Should they be obtained, it will be through no grasping spirit, but with a view to obvious national interests and security, and in a manner entirely consistent with the strictest observance of the national faith and the cultivation of peace and amity with all nations. Purposes, therefore, at once just and pacific, will have significantly marked the conduct of our foreign affairs.”

## CHAPTER III.

### EMINENT DOMAIN.

SEC. 1. Eminent domain is an attribute of sovereignty, and belongs to every nation and State. It is the right of taking private property for public use, in the mode prescribed by the constitution and laws, and for the objects adjudged by their respective legislatures to be of public utility. (*Vattel*, B. 1, c. 20, § 244. 10 *Pet.* 722, 723. 3 *How. U. S. R.* 223. 6 *Ib.* 531. 2 *Kent's Com.* 5th ed. 338, 339, n. 25 *Wend.* 173. *Wheat. Int. L.* P. 2, c. 4, § 3.

It is obvious that full compensation to the owner ought to be made by the government to the individual whose property is taken for public use. For it is a first principle of equity that all public burdens should be equally borne, and that each citizen should merely contribute his *pro rata* share of public charges. Hence, that portion of the public for whose use private property is taken, ought equally to contribute to the full payment of the owner of the property taken by this sovereign power. (*Grotius on P. & W. P.* 3, c. 20, § 7.)

Our treaty with Mexico has provided that, in case of invasions, the taking of private property of non-combatant enemies shall be followed or accompanied by full payment.

The Constitution of the United States and that of France of 1848, enforces the duty of making full payment, whenever the right of eminent domain is exerted.

Nearly all the State Constitutions of our Union affirm the same principle; and where any constitution has omitted



the provision, natural equity will compel the tribunals of such a State to decree, agreeably to American public law, that private property cannot be taken for public use without just compensation.

This power of eminent domain may be exerted by a State or nation by the intervention of agents, corporate bodies, municipal corporations or any tribunal authorized by law to employ it. It may be exerted for any purpose adjudged by the legislative power of the State or nation to be of public utility.

This right of eminent domain proceeds on the principle that the ultimate property in every community, both as to realty and personalty belonging to citizens and resident foreigners domiciled there, resides in the State or nation, and that it may properly take private property for public use when the public good shall be adjudged by its legislature to require it. (6 *How.* 531, 532. 4 *Wheat.* 429. 16 *Pet.* 447.)

All personal and real property of resident and domiciled foreigners is equitably subject to eminent domain and taxation equally with that of citizens, on the ground of a common protection. (5 *How.* 623.)

Foreigners owe a local allegiance to any country they dwell in. (2 *Kent's Com.* 4th ed. 64.) Their property receives protection and is subject to the laws.

In admitting Illinois as a State, Congress imposed the condition that no higher taxes should be levied on non-resident owners of lands, citizens of the United States, than on citizens of that State. (3 *U. S. St. L.* 431, § 6.) The same rule was applied to the State of Mississippi, (*Ib.* 349, § 4,) and to other States. (See, also, *Const. U. S.* art. 4, § 2, and ch. 1, § 15.)

In *Mills vs. St. Clair County*, (8 *How. R.* 585,) it was held by the Supreme Court of the United States, that, in the taking of lands by eminent domain for roads, ferries

and other public purposes, the quantity deemed necessary alone ought to be taken, and that the taking of more with a view to dispose of the surplus for private use would be an evasion, and would be void, and might be redressed by action; but that the State authorities alone were the legal judges where such taking was by virtue of a State law, and that no appeal on such a point lay to the Supreme Court of the United States.

In the same case that court held that the regulation of ferries across navigable streams was a subject of government control, and not a matter of private right, and that in construing State laws granting a ferry franchise, the grant was not to be extended by implication.

In *Embury vs. Conner*, (3 *Comst. R.* 516, 517,) the New-York Court of Appeals decided that the legislature may authorize a corporation to take private property for public use, but that the taking must be confined to the quantity necessary for public use, as the legislature cannot take one man's property on paying him for it, and transfer it to another. The court approved the doctrines of *Taylor vs. Porter*, that the constitutional provision, "No person shall be deprived of life, liberty or property, without due process of law," could not mean less than that such deprivation could not be effected except by a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property.

In the United States, the national and State legislative bodies have, respectively, for national and State objects, rights of eminent domain and of taxation. The Constitution of the Union confers on Congress these rights, or recognises them by regulating it as to all the States of the Union, and generally as to property therein. The Constitution of the Union, however, securing to each State a republican form of government, and the exclusive main-

tenance of municipal law therein, it seems manifest that property of a State within its territory, pertaining in any manner to its municipal functions, would not be legally taxable by Congress, or subject to the right of eminent domain in Congress, except where Congress has a concurrent power, making the taking of the State property necessary to the execution of the paramount powers of Congress. Congress has a right to remove impediments to navigation in navigable rivers, the great lakes, on our sea-coasts and in our harbors, and may, on making full compensation, take any land under water, or other property for that purpose, or for forts, or for any national object. The exemption is in the nature of the thing. Taxation upon, or the taking away of means used by a State for its municipal object, seems incompatible with its independent municipal jurisdiction. (3 *How.* 229, 230. 2 *Pet.* 466.) So far, therefore, as the Constitution of the Union restrains by implication or express prohibition Congress from the exercise of taxation and the right of eminent domain, its power is limited. (*Const. U. S.* art. 1, § 8; § 9, sub. 3, 4, 5; art. 3, § 8. *Amend.* art. 5, § 3. 7 *Pet.* 243, 248. 16 *Ib.* 447.)

The limitations of these powers in the States of our Union are found in the Constitution of the Union, and of the States respectively. (*Const. U. S.* art. 1, §§ 8, 9, 10; sub. 3, 4, 5; § 10, sub. 1, 2. 16 *Pet.* 447. 2 *Ib.* 467, 468. 4 *Wheat.* 316, 429. 9 *Ib.* 738. 11 *Pet.* 642.)

SEC. 2. The State right of eminent domain and of taxation for municipal objects exists in the respective States, except so far as it is limited by the express provisions of the respective State constitutions, and of the Constitution of the Union, and by incompatibility. (*Ohio Cond. R.* 739.) The 6th article, § 2, declares "that the Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of

the United States, shall be the supreme law of the land." Hence the national powers of eminent domain and taxation in Congress are supreme, and cannot, within their constitutional limits, be impeded, impaired or annulled by a State law, and every such law is void. (2 *Pet.* 449, 467. 4 *Wheat.* 316, 429. 9 *Ib.* 439. 16 *Pet.* 447, 448. The emigrant tax cases of *Smith vs. Turner* and *Norris vs. The City of Boston*, decided by the Supreme Court of the Union in 1849, adjudged that a State cannot tax passengers or property arriving in any port of the United States from any other port of this country, or from any foreign country, as such State law infringes the power of Congress over commerce. For the same reason that court decided that a State law requiring importers to pay fifty dollars license tax before selling goods imported by them, was illegal and void. (*Brown vs. Maryland*, 12 *Wheat.* 436.) In the license cases, that court determined, that after packages are broken for use or retail, or goods have passed from the importer, they become part of the internal trade of a State, and subject to its license, tax and other laws regulating the consumption and interior commerce of its citizens. Chief Justice Taney, in giving a decision, said, that when the original package is broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other property. (5 *How.* 574, 575.)

The Supreme Court of the Union, in *Weston vs. City of Charleston*, (2 *Pet.* 467,) repeated the doctrines of *McCullough vs. Maryland*, (4 *Wheat.* 316,) and decided that all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it

does not extend, are, upon the soundest principles, exempt from taxation. That the sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. That the attempt to use the power of taxation on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. The court, alluding to the decision in *McCullough vs. The State of Maryland*, said, in that case, that the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. The court, upon this principle, decided (2 *Pet.* 449, 467, 468) that a State law of South Carolina, imposing a tax specifically on United States stocks held in that State, was illegal and void; and that no State could inhibit, impede or burden by tax a loan by its citizens to the United States. In the case of *McCullough vs. Maryland*, (4 *Wheat.* 316,) it was held that a State could not tax the property of the Bank of the United States, as it was a financial instrument of the nation, and created by Congress as a necessary means to carry into effect its constitutional powers. Upon the same principle, in *Osborn vs. The United States Bank*, (9 *Wheat.* 738, 838, 845, 846,) it was held that a law of the State of Ohio, imposing a tax on the Branch Bank of the United States in that State, was illegal and void, and that the bank might, by bill in equity and injunction in the federal courts, prevent the levy of such illegal tax by the State officer, such officer being made a defendant. In the case of *Dobbins vs. Commissioners of Erie County*, (16 *Pet.* 435, 448, 449,) it was

held that a law of Pennsylvania, imposing a tax upon a United States officer for his office or salary derived from the United States by act of Congress, was unconstitutional and void, as a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers. The court (p. 447) says, taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of the State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution. And the States by such as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State upon the instruments, emoluments and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the Union is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution are to be settled by acts of Congress. Taxation is a sovereign power in the State; but the collection of revenue, by imports upon imported goods, and the regulation of commerce, are also sovereign powers in the United States.

But a State may lawfully, it seems, tax all the personal property held by persons residing within its territory, *en masse*, and State laws usually tax all of the surplus personalty above the debts due from the owners of it. This seems legal. (1 *Kent's Com.* 5th ed. 427, 428, n. a. 2 *Bailey's C. R.* 654. 9 *Yerg.* 490. 2 *R. St. N. Y.* 2d ed.

p. 383, § 15.) A tonnage duty is a tax. (4 *Wheat.* 202.) But this point has not been yet adjudged by the Supreme Court of the United States.

SEC. 3. In *Brown vs. Maryland*, (12 *Wheat.* 449,) and in *Smith vs. Turner* and *Norris vs. The City of Boston*, the court held that a State could not exert a taxing power on property passing through a State, into or from a State, as the power over all inter-State and foreign commerce was in Congress. While a State may pass inspection laws, it cannot levy transit or other duties on imports, or exports or tonnage. (*Const. U. S.* art. 1, §§ 8, 10; *Post*, ch. 5, §§ 3, 5. 16 *Pet.* 447.)

Under its general taxing power a State may impose a license tax on an exchange broker, or on any State occupation or profession, or a tax on legacies. A State may levy a tax on any property mingled with the mass of State property, after it ceases to be an import, or before it becomes an export, subject to the limitations created by the Constitution of the Union. (8 *How.* 78, 80, 81, 493, 494.)

A State may tax property of foreigners situate within its limits, which they claim as heirs, devisees, legatees or parties in distribution, whether it consists of movables or immovables. (8 *How.* 493, 494.)

By virtue of its sovereignty a nation may claim by escheat real property within its territory to which there is no heir according to the *lex loci*.

Upon the same principle, a nation or State, where movables are found to which no private legal owner exists, becomes their owner. (8 *How.* 493, 494, ch. 1, § 16.)

In *Town of Gilford vs. Supervisors of Chenango County* the New-York Court of Appeals held, where a State legislature passed a law to compel a town, by a town tax, to pay certain of its public officers for expenses incurred and costs paid for the use of the town, and which were incurred properly in its service, though before the law was passed, that the act was constitutional and valid.



This case proceeds on the principle that a State legislature, as sovereign, can, through the taxing power, compel cities, towns, counties and villages to indemnify their public officers in such cases as the legislature shall deem just. If this were not so, in many instances public officers would be subject to great injustice.

A State may, by a statute, exempt a corporation, in consideration of public services, from taxation, or limit it. (18 *How.* 331. 16 *Ib.* 369.)

In the formation of new States, Congress, by the acts authorizing or ratifying the State constitutions, and the States, in their conventions and by their laws, have declared certain fundamental principles which seem declaratory of American public law ; and among them, that the great lakes and navigable rivers and carrying places are free, without toll, to all American citizens ; (1 *U. S. St. L.* 50, 51, n. ;) that the property of the United States is exempt from State taxation. (*Rev. St. of Michigan*, 76, § 4. *St. of Missouri*, 529, § 2. 1 *Laws Missouri*, 37, § 4. *Rev. St. Wisconsin*, 22, 792.) Several of the old States have, by declaratory acts, affirmed the same rule of law. (1 *N. Y. Rev. St.* 2d ed. 379, § 4. *Pub. Laws of Rhode Island*, 431, § 28. *Mass. Rev. St. of 1836*, p. 75, § 5.) This rule of our public law seems to exempt from taxation by a State the property of the United States. But a judicial difference of opinion exists on this point. What can be more unseemly than a State tax on a United States arsenal, mint, custom-house, or other national property held in trust for the whole Union? (*Acts Cong.* 1850, p. 449, § 7.) Such a State law seems incompatible with the paramount authority and duty of the national government, as well as with the supremacy of the Constitution and of acts of Congress. The general practice of the States, with a few exceptions, is in conformity to the above doctrines.



As the national government, to the extent of its powers and duties, is supreme, and as all State law, so far as it is in conflict with them, is superseded by them, we cannot see how, upon the principles of our system, a State right of taxation or of eminent domain, can be legally exerted upon any property of the United States used as a means of executing its national powers. (9 *Monthly L. Rep. N. S.* by Lowell, 261, 262.)

The general practice of the government has been in accordance with our views. The Western Rail-Road of Massachusetts was made through the lands of the United States, at Springfield, by virtue of an act of Congress and under the direction of the Secretary at War, and on condition that it should revert to the Union on discontinuance of the rail-road. (5 *U. S. St. L.* 17.) Acts of Congress have been applied for, and have been passed, granting a right of way over United States lands for roads and rail-roads in many States. (5 *Ib.* 63, 65, 66, 145, 146, 196, 197. 6 *Ib.* 315.) For State purposes, as sites for State legislative halls and county court-houses, acts of Congress have been applied for and passed. (6 *Ib.* 846, 847. 4 *Ib.* 50.) In the case of the *United States vs. Chicago*, (7 *How.* 185, 194, 195,) the Supreme Court of the Union decided that lands of the national government, held appurtenant to an old United States fort, could not be taken for streets by virtue of a State right of eminent domain. Mr. Justice Woodbury, in giving the opinion of the court, suggests that United States lands, held by cession, are exempt from this State right, but that lands purchased within a State for ordinary purposes by the general government, are subject to the State right of eminent domain, for streets, rail-roads, &c. And he cites the case of *United States vs. Ames*, (1 *Wood & Minott's C. C. R.* 88.)

An able jurist in the *Monthly Law Reporter, N. S.* by

Lowell, vol. 9, p. 262, considers the law as settled, that the public lands of the United States, held for sale and settlement, are liable to eminent domain of the States where they are situated, like all other property, for roads, rail-roads and other public municipal objects. This seems to be a correct view of our public law.

This writer, as we think with good judgment, strongly insists that State taxation of national property is unseemly, and in conflict with the powers of Congress and the national government, which are supreme, and cannot be interfered with in any manner by a State. Hence he repudiates the existence of such a power. (*Ib.* 261, 262.)

The federal government, in organizing new States, prohibits, uniformly, the States from taxing the national public domain, and has not recognised any right of taxing national property. The Constitution, art. 1, § 2, says: "Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians, not taxed, three-fifths of all other persons."

In *Hylton vs. The United States*, (3 *Dall.* 171,) the Supreme Court of the Union decided that the taxing power of Congress was plenary for national objects, and included, 1. Direct taxes; 2. Duties, imposts and excises; and 3. All other classes of an indirect kind, and not within any of the classifications enumerated under the two preceding heads, and that they must be uniform.

In *Loughborough vs. Blake*, (5 *Wheat.* 317,) the Supreme Court decided that this national power of taxation extends to all places over which the government extends, and includes the District of Columbia and the territories

of the United States. That Congress cannot exempt a State from its share of direct taxes, but that Congress is not bound to extend a direct tax to the District of Columbia and the territories of the Union.

Foreigners, upon principle, cannot be liable to military duty, as they might thereby be forced to fight against their own country or its allies; and, for the same reason, a military tax, by way of substitution for such duty, cannot be imposed on them lawfully. (*Vattel*, B. 2, c. 8, §§ 106, 107.) The act of Congress properly confines military duty in our republic to its own citizens. (1 *U. S. St. L.* 271.)

In the *People vs. Nagle*, (1 *California R.* 232—238,) the Supreme Court of California held that a State law imposing a tax for a license upon foreigners working the gold mines found in the public lands of the United States in that State was legal.

SEC. 4. All the real and personal property of the United States, all its instruments and means of executing the national powers, as a national exchequer or bank, United States stocks, salaries of United States officers, national roads made by Congress for any national object, arsenals, navy yards, mints, custom-houses, forts, would seem, on principle, exempt from State taxation and the State right of eminent domain, as they are the means of executing the paramount powers of the United States over national subjects. The whole territory of the Union is, for national affairs, one government, and the Constitution has made the granted powers of Congress supreme; and though the State legislatures as well as Congress may levy taxes, this power, of necessity, it would seem, cannot reach the property of the Union, its means or instruments of performing its duties. For, if a State may tax a custom-house or mint, it may levy a per cent. on its receipts so high as to absorb the national duties or income, and

thus make the State power paramount to that of the Union. This would also violate the constitutional theory of our government, which has wisely separated the national and State governments in their duties, giving national and paramount powers to the Union, and municipal authority to the States. (16 *Pet.* 447. 1 *Kent's Com.* 5th ed. 425, 426, *ante*, § 2. 4 *Wheat.* 316. 9 *Ib.* 738.) Congress has often declared, in admitting new States, that their respective legislatures should have no power to tax United States lands, and even exempted such lands from State taxation a certain number of years after their sale. (3 *U. S. St. L.* 349, § 4; pp. 430, 431, § 6; p. 291, § 6. 5 *Ib.* 50, § 4; p. 51, § 8. See acts of Congress admitting Wisconsin and California, article 2, § 2, of the constitution of the latter State of 1848, assenting to the Congressional condition that the State should not interfere with the public lands or their disposition, or tax any United States lands, or the lands of non-resident proprietors, higher than those of residents.)

After public land is sold by the United States and paid for, and no exemption from State taxation for a time is fixed by a law of Congress, assented to by a State, then it becomes subject to plenary State taxation. (3 *How.* 461.)

As the State governments have charge of the construction of streets, roads and canals for municipal use, a State right of eminent domain may take, it would seem, United States lands for those objects, if they are not set apart by the national government for a special purpose, as a fort, lighthouse, &c. (7 *How.* 194, 195. 1 *Wood & Minott's R.* 80, 81.)

A State may tax cars, stages or carriages owned by individuals, and used for transporting the mails, if taxed at the same rate with other property. (7 *How.* 402.)

SEC. 5. A State, for a valid consideration paid, may

grant a charter to a corporation, and exempt its franchises and property from State taxation. Such exemption for such consideration may be contracted by a State in a sale of its lands, and such exemption laws are valid, and cannot be repealed by the State legislature. (3 *How.* 133. 16 *Pet.* 289. 6 *How.* 331. 7 *Cranch*, 164. 16 *How.* 369.) Such exemptions must rest on express and positive contract, which, being against equality of taxation, ought not to be extended by construction.

SEC. 6. The States of our Union, by virtue of their reserved sovereignty, possess the right of eminent domain, for all municipal objects of public use or convenience, as to all property and franchises within their respective limits, subject to the limitation imposed by the Constitution of the Union and their respective State constitutions. (3 *How.* 230. 6 *Ib.* 531. *Wheat. Int. L. P.* 2, c. 4, § 3. 18 *Wend. R.* 13, 25, 173—175. 4 *Hill's R.* 143—147. 3 *Paige's Ch. R.* 57, 58. 11 *Pet.* 420, 536. 7 *Mass. R.* 395. *Angell on Water-Courses*, 4th ed. 506. 1 *Dall.* 537. 1 *Bald. C. C. R.* 205. 8 *Barb. R.* 486.) Such objects are public squares, streets, roads, almshouses, public mills, canals, telegraphs, draining extensive marshes, the supplying cities and villages with water, the erection of bridges, ferries, and, perhaps, the conversion of tenures deemed injurious to the public good, into allodial. These, when declared by a State legislature to be demanded for public use or convenience, may, it would seem, become the objects of State eminent domain.

SEC. 7. Congress has a right of eminent domain as to all property and franchises within the United States for national objects, subject to constitutional limitations. The Constitution regulates the right, and thus assumes its existence. (8 *Wheat.* 101.) By virtue of this power our national government, by treaty, may release a foreign nation from liability to pay our citizens claims or debts

due them; and, in such cases, the United States are bound, in equity and by the Constitution of the Union, to pay the American claimants. (*Const. U. S.* art. 5. 11 *Pet.* 642. *Grotius on P. & W.* B. 3, c. 20, §§ 8, 10.) Congress is the sole judge of the necessity of taking property for national objects. (4 *Wheat.* 429.)

SEC. 8. In the District of Columbia and the territories of the United States the right of eminent domain, for national and municipal objects, is vested exclusively in Congress. (*Const. U. S.* art. 1, § 7; art. 4, § 3. 5 *Wheat.* 317.)

Over places within the States, where jurisdiction has been ceded to the United States, no State jurisdiction remains, except so far as reserved by the cession. (1 *Wood & Minott's R.* 84.) All such places are subject to acts of Congress, treaty law and the Constitution of the Union.

SEC. 9. Congress can, in no case, exercise the right of eminent domain for a national object, either by direct taking, or by treaty, releasing private property, without making full compensation to the owners of the property so appropriated. (*Ante*, § 1, 7. 11 *Pet.* 642. 7 *Ib.* 247. 8 *Ib.* 110. 2 *Ib.* 380. *Wheat. Int. L.* 308, 568.) The Constitution prescribes this condition, and thereby recognises the existence of a right of eminent domain for national objects, by the limitation of the power. And thus the national government is admitted, by a necessary implication, to possess, as an attribute of sovereignty, this authority. (*Ib.*) Grotius applies this doctrine to treaty releases of private claims and property, as well as to property destroyed by an enemy, and he holds that, upon principles of equity, the loss should be charged on the national treasury, so that each citizen may bear his just *pro rata* share of the loss of property by national appropriation or belligerent destruction. (*Grotius on P. & W.*

B. 2, c. 14, § 7; B. 3, c. 20, §§ 8, 10. See, also, *Vattel*, B. 1, c. 20, §§ 244, 245.)

The Constitution of the French republic of 1848, as well as that of Greece, contain the same principle as the Constitution of the United States, requiring indemnity in all cases.

Upon this obvious principle, that all the citizens of a State or nation ought to bear equally its burdens, Buller, J., held that no action lay "for pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil law writers," says he, "indeed say that the individuals have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individuals who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema est lex*." (4 *T. R.* 796. 1 *Denio's R.* 598. 1 *Dall.* 362. 17 *Johns.* 52.)

SEC. 10. In exercising the right of taking private property for public use, all States and nations, from the nature of the right, must actually take it for a purpose adjudged by the legislative power to be for the public use or convenience. (*Ante*, § 1. 16 *Vermont R.* 449. 18 *Wend.* 13. 11 *Pet.* 642. 8 *How.* 585. 6 *Ib.* 531. 2 *Kent's Com.* 5th ed. 339, 349.)

It may be so taken for a public use by State agents, or by the intervention of courts or municipal bodies. (6 *How.* 531, 532. 18 *Wend.* 13. 25 *Ib.* 173, 174. 3 *Paige's Ch. R.* 57, 58. 2 *Hill*, 24.)

A public use seems to be where the property is appropriated for public defence, public health or public convenience, and of this the legislature of each State or nation is the sole judge.

But the taking, by a law, of the property of one man



and transfer of it to another, would not be a taking for public use, and whether a full compensation was made or not, it would be tyrannical, and such act would, upon principle, be illegal and void. (5 *Paige's Ch. R.* 158. 3 *How. U. S. R.* 213, 230. 18 *Wend.* 59. 4 *Hill*, 46, 47. 2 *Kent's Com.* 5th ed. 340. 11 *Pet.* 642. 8 *How. R.* 585. 3 *Comst. N. Y. R.* 517. 11 *Wend.* 149. 19 *Ib.* 676.)

SEC. 11. A State of our Union owns the soil under navigable rivers and all navigable waters within its limits, subject only to the national rights of free navigation and commerce, and other powers granted by the Constitution of the United States. In maritime States their curtilage forms part of their jurisdiction. Within such limits the State right of eminent domain, subject to constitutional limitations, seems to attach to such soil and navigable waters of a State; with that restriction, the State regulates fisheries, ferries, bridges, piers, wharves and State improvements of channels, &c. This State right to the soil under its navigable waters extends from below ordinary high-water mark. (3 *How.* 213, 230. 16 *Pet.* 410; see ch. 6, § 6. 5 *Gilman's R.* 351. 4 *Wend.* 11, 25.)

State legislatures have power, within their respective territories, to prescribe the lines of wharves, and to declare those a public nuisance that extend beyond them, even though the riparian owner's right to the soil under water for wharfage and commercial purposes goes beyond such lines, and though no actual injury is done to navigation, and no compensation to the owner is provided by the law. (7 *Cushing's Mass. R.* 53, 101—104.)

An indictment at common law lies for any public nuisance erected in navigable waters. (*Ib.* 101, 103.)

SEC. 12. A State may exert its power of eminent domain by the intervention of corporations or associations,



and may regulate the tolls for the use of all State works thus made, such as rail-roads, canals, ferries and telegraphs.

It seems that as to all artificial navigation of a State and all such works, State laws may allow a discrimination of tolls in favor of the citizens of the State as between them and citizens of other States and foreigners. (4 *Wash. C. C. R.* 378.) Vattel asserts this as a rule of the law of nations, and as a mode by which a nation might justly compel all foreigners to contribute a fair *pro rata* towards the construction and support of such works. This may be a right of State and national sovereignty, but such discrimination in tolls is not in harmony with the liberal commercial spirit of the age, and seems to be against sound financial policy.

In our republic, national works alone, in execution of acknowledged constitutional powers over commerce, the mails and military defence can be executed when directed by acts of Congress; whether tolls can be collected on such national works is an unsettled point. If a national railway, from Lake Michigan or St. Louis, were made to the Pacific for mail and military purposes, it might lead to a solution of the question.

In *Hartwell vs. Armstrong*, (19 *Barb. R.* 166—168,) the Supreme Court of New-York say, that eminent domain is vested in the people of every State, and may be exerted, as prescribed by its constitution and laws, whenever a State legislature decides that its exertion is necessary to the public good. That a State may exert this power in draining swamp lands and marshes, and in bringing water into cities and villages. That in such cases the object is public, though a small number of persons may be immediately benefited. And that, when the legislature passes such laws and adjudges the necessity of taking private property for such public purpose, and its agents, commissioners or corporations, pursuant to law,

take such private property for such object, the courts cannot review the exercise of the legal discretion exercised by them and conferred by law, if the persons acting under State authority proceed in good faith in discharging their public duties. But that, if there were gross invasions of private rights, unjustified by any semblance of public necessity, that then the courts might interfere and protect them; but that the case must be very clear to warrant such judicial interference.

The same doctrine is held by the Supreme Court of Massachusetts. (4 *Cushing's R.* 60.)

The above principles with regard to eminent domain have been sanctioned in the Court of Appeals of New-York. (3 *Selden*, 314.)

In *Moore vs. The Mayor, &c.*, of New-York, (4 *Selden's N. Y. Ap. R.* 110, 113, 114,) the Court of Appeals of New-York held, that where the legislature authorized a corporation to take lots and lands in fee simple absolute, for a public purpose, and its full value was appraised according to the law and paid to the owner, his wife not being a party to the proceeding, that, upon his subsequent death, she could not recover dower in the premises, as, at the time of the taking and appraisal, she had no fixed and appraisable right in the land.

Whenever the State authorizes the taking of land in fee, by virtue of eminent domain, upon taking and paying for it, the absolute fee vests in the State or corporation for whom it is condemned. (1 *Kernan's N. Y. Ap. R.* 314.)

In *Chace vs. Sutton Manuf. Co.* (4 *Cush. R.* 152) it was decided, that where dams are authorized as part of canals or other works, by associations or corporations, that flow back water upon the lands or mill-seats of any person, or create reservoirs there, to his injury, he is entitled to damages. (*Ib.* pp. 155, 161, 162.)

It was also held, that a grant by law of power to use the water of such reservoirs for mills, as well as for a canal, was valid, and that the canal company, having paid full damages for a perpetual easement and right of flowing of plaintiff's land, for purposes of a public or quasi public nature, for canaling and milling, that an abandonment of the canal and transfer of it to a rail-road company, pursuant to a State law, did not deprive defendants and others owning mill privileges and water-power, dependent on such reservoirs, of their rights, and that the owner of the lands was not entitled to a second assessment of damages, or to repossess himself of his land and water, as it was before the construction of the canal. (pp. 167—169.)

The court held, that the law allowing the sale of the canal to the rail-road was valid, and that the legislature had authority, by right of eminent domain, for the creation of water-power for public mills, to allow a man, on his own land, to erect dams and flow another's land, on making full compensation for damages. (pp. 169—171.)

In *Harris vs. Thompson*, the case of the Fort Miller dam, erected originally by the State of New-York, as part of the Champlain Canal, and afterwards continued in aid of mills, pursuant to State laws, they were held valid, and the rights of the mill-owners were held, by the Supreme Court, protected by law. (9 *Barb. S. C. R.* 350.) In this case the canal use had been, by law, abandoned, and the dam was kept up for the mills in use, and the State paid the damages arising from flowing or wetting the lands of individuals.

The court held, that the legislature alone was the judge of the necessity or expediency of appropriating private property to public use; and that the court could not revise its decision. That the court had simply power to

inquire whether private property is taken for a public or private purpose. (p. 362.)

SEC. 13. A nation, a State of our Union or the United States, within the District of Columbia or the territories of the Union, by the law of nations, have the right to tax the property of resident foreigners, by virtue of their sovereignty, as a compensation for protection. All property of non-residents, as well as residents, are subject to dues and customs on importation into a country, unless exempted by its laws. (8 *How.* 493, 494. 5 *Ib.* 523.)

In the internal taxation of a nation or State, natural equity demands equality of taxation; and it is a principle of American law applicable to national and State taxation. (*Const. U. S.* art. 1, § 2; art. 4, § 2. *Const. Wis.* art. 8, § 1. *Ord.* 1787, art. 4, *ante*, §§ 1, 2, 3. *Act ad. California Acts Cong.* 1850, p. 452, and other *Acts ad. States*, and *ante*, ch. 1, § 15.)

In our Union, a State, by virtue of its municipal sovereignty, cannot tax persons or property coming into it by sea or land, from any foreign country, or from another State. It may levy charges absolutely necessary to support its inspection laws on property, but no duty on tonnage on exports or imports can be levied by a State, unless authorized by Congress, and then, except as herein stated, they go to the treasury of the Union. (*Const. U. S.* art. 1, § 10, sub. 2.)

#### RETROSPECTIVE LAWS.

SEC. 14. Nations, Congress and our States, within their several jurisdictions, may pass retrospective laws to confirm titles and transactions according to their intent, though defective in some legal form or evidence.

Such laws, divesting any legal vested right or title, are unjust, and in violation of that great elementary principle

of natural equity—that no man shall be deprived of any right without due process of law, and an opportunity of being heard in defence of it before a competent tribunal. (1 *Kent's Com.* 455, n. e. 8 *Wheat.* 493. 6 *How.* 331. 14 *Pet.* 365. 10 *Ib.* 294. 4 *Serg. & Rawle*, 401. 1 *N. Hamp. R.* 199. 2 *Pet.* 657, 658. 8 *Ib.* 108. 10 *How.* 395. 6 *Barb. S. C. R.* 213. *Const. U. S.* art. 5, and *State Consts.* 16 *How.* 369.) That natural equity is a principle of American law.

In our republic the courts of the respective States alone have jurisdiction to pass upon retrospective State laws, and determine their effect and validity, unless they are in conflict with a treaty or act of Congress, or impair the obligation of a valid contract, or unless the State law is a bill of attainder or *ex post facto* law, which are retrospective statutes, and inflict penalties or punishments not enacted at the commission of the offence. (10 *How.* 399, 400. 8 *Pet.* 110.) A bill of attainder is a special act for punishing one or more particular offenders for past acts or omissions. Congress and the State legislatures are, by the Constitution of the Union, prohibited from passing such penal and criminal laws. They do not relate to civil suits or proceedings, but to penal and criminal only. (*Const. U. S.* art. 1, § 10. 8 *Pet.* 110. 7 *Ib.* 247. 11 *Ib.* 538, 540.)

The Constitution of the French Republic of 1848 has adopted our prohibition of bills of attainder, by declaring “the power of confiscation shall never be re-established.”

A State may lawfully pass recording laws, by which one class of deeds, mortgages or contracts may take precedence of others and in effect annul them. (3 *Peters' U. S. R.* 280, 290.)

A State may pass usury laws, if not retroactive. (4 *Wheat.* 207.) It can pass new recording laws, and shorten

or lengthen statutes of limitations. (6 *How.* 331. 5 *Pet.* 437.)

A State may also pass statutes of limitations, and when a right is confirmed or barred by such law, it ought to be so held, it seems, in all other States and nations, by all our State courts and by the Supreme Court of the Union. (13 *Pet. R.* 312, 326, 327. 6 *How.* 61, 62. 4 *Wheat.* 206. 12 *Pet.* 33. 5 *Ib.* 151, 402, 441. 1 *How.* 51. 8 *Pet.* 361.)

A statute of limitations begins to run on the repeal of a proviso on excepted debts from the date of the repeal, unless otherwise provided. (7 *How.* 779.)

State recording laws are valid as to past as well as future contracts, if opportunity is allowed to comply with them. (3 *Pet.* 280, 290.)

State tribunals have decided variously with regard to foreign statutes of limitations. We have given the effect of the decisions of the Supreme Court of the United States.

Where a State passes recording laws or statutes of limitations, they must give the holders of contracts or deeds, mortgages, &c., an opportunity to comply with the law or enforce their rights to be valid—otherwise they would violate contracts and fall within the constitutional prohibition on that subject. An act instantly destroying all remedy or right would be against natural equity, and would be in effect a taking away from a man his property without compensation, and transferring it to another. (13 *Pet.* 45, 62, 64. 8 *Mass. R.* 430. 2 *Greenl.* 294. 2 *Gall.* 141. 4 *Wheat.* 207. 8 *Ib.* 84. 3 *Pet.* 290. 1 *How.* 316. 3 *Ib.* 717.)

No repeal of any laws, or the making of new rules of evidence by a State legislature, can divest a man's right or property already perfect under existing laws. (16 *Pet.* 492; *post*, ch. 5. 8 *Wend.* 661. *Fletcher vs. Peck*, 6 *Cranch*, 87. 1 *How. U. S. R.* 311, 315. 4 *Wheat.* 207.

12 *Ib.* 260—262, 352.) Nor will a change of domicil impair a right to personal property, the title to which has become perfect under the laws of a State of our Union, or of a foreign nation. (11 *Wheat.* 369, 371.)

A law of a State, purporting to legislate as to a remedy for collecting debts, which takes away a part of the security pledged by a contract to a creditor at the passage of the law, is a law impairing the obligation of existing contracts by retrospective action, and violates the constitutional prohibition against State laws impairing the obligation of contracts. (*Bronson vs. Kenzie*, 1 *How.* 311, 315, 316. 3 *Ib.* 717. 1 *Ib.* 320. 8 *Wheat.* 1, 71, 75, 84.)

In *Murray vs. Gibson*, (15 *How. R.* 423—425,) the Supreme Court of the United States decided that statutes of limitations, and other statutes, are not to be construed to have a retroactive operation, unless such construction is unavoidable; but that they are to be deemed to speak for the future, as a general rule.

That as a general rule, courts adopt the interpretation of State statutes given by their respective highest tribunals, provided it does not conflict with the paramount authority of the national constitution or laws of the United States binding upon their own courts, or with the fundamental principles of justice and common right.

The Code Napoleon says: "The law ordains for the future only; it has no retrospective operation."

By change of remedies on contracts, existing rights cannot be taken away. (1 *How. U. S. R.* 316, 319. 8 *Wheat.* 1, 75, 76, 84. 3 *How.* 717. 8 *Ib.* 320. 14 *Ib.* 488.)

These principles govern the effect of State laws, when a suit is brought in any court, whether national, State or foreign court.

When a suit is brought in any State court of our Union, the statute of limitations of the *lex fori* governs, as that



law regulates the remedy, though incidentally affecting the rights of parties. (13 *Pet.* 324—327.)

This is so when a suit is brought on a judgment recovered in another State, as well as on contracts. (13 *Pet.* 327.)

Laws, being rules for conduct and ascertainment of right, are in their nature prospective. Retrospective laws, taking away or impairing rights of property, except under the right of eminent domain, when exercised under an act of Congress for a national object, or a State law for public use and upon full compensation, are condemned by natural equity, and ought to be held illegal and void in all tribunals.

SEC. 15. The right of eminent domain attaches to all property rights of every sort, to realty, personalty, to franchises, and to all rights secured by contract or otherwise. It has been debated whether a State granting a charter to a company to erect a bridge, establish a bank for a given period, could, by virtue of the right of eminent domain, take such franchise and connected property of a corporation, prior to the expiration of the charter, on full payment of damages duly assessed. (18 *Wend.* 13. 13 *How.* 71. 23 *Pick.* 360. 6 *How. U. S. R.* 531, 532.)

Article 5th of the amendments of the Constitution of the United States limits the power of Congress to taking private property, by virtue of the right of eminent domain, to cases where it is needed for national public use, and upon payment of a just compensation. It presupposes the power in Congress and the national government, and limits its exercise. (*Barrow vs. The City of Baltimore*, 7 *Pet. R.* 243.) Congress may judge of the necessity of taking private property for such public use, and so may the President and Senate in making treaties. The decision of Congress on that point must, upon principle, be final, and if full compensation is made to the owners of



the property taken, no judicial tribunal can review the questions of public necessity or public use. (9 *Barb. N. Y. R.* 350, ch. 5, § 19.)

In *Cushman vs. Smith*, the Supreme Court of Maine, by its able Chief Justice Shepley, decided in this case: 1st. That the clause in American constitutions, prohibiting the taking of private property for public use without compensation, does not prohibit a legislature from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of title to it, or to an easement. 2d. That it prevents a permanent taking, occupation or appropriation of it, for public use, without the actual payment or tender of a just compensation for it. 3d. That an unreasonable delay in such payment or tender would defeat such incipient right of occupancy. 4th. That an action of trespass will lie for such occupancy, accompanied with unreasonable delay of payment or tender. 5th. That, in such cases of delay, an action of trespass on the case may be maintained to recover damages for all injuries occasioned by prior occupation. And it was decided, in that case, that such an action of trespass was sustainable against the incipient occupants, who had failed to reasonably pay or tender payment for the land proposed to be taken, by virtue of a right of eminent domain.

In the case of *Bonaparte vs. The Camden and Amboy Rail-Road Co.*, (1 *Baldwin's C. C. R.* 205, 216,) a bill in equity was filed to prevent the defendants from locating a rail-road through the plaintiff's pleasure grounds at Bordentown, N. J., on the ground of irreparable injury to the estate of plaintiff, an alien.

Judge Baldwin decided that the 11th section of the Judiciary Act gave jurisdiction to the Circuit Court in all cases of a civil nature at law or in equity, (1 *Story*, 57,) independently of any State law; and that as an alien, the

plaintiff had a right to sue in the United States Circuit Court for an injury to his lands in New-Jersey, just as though he lived in a foreign country.

The learned judge held, that though a State cannot be sued, that its agents might be prosecuted in reference to money actually collected and paid into the State Treasury, if illegally obtained, (9 *Wheat.* 743,) and that the defendants, as agents of the State, might be sued for their acts, if illegal. (pp. 217, 218.)

That government has the power to take private property for public use, of the necessity or expediency of which it must judge, but that the obligation to make just compensation is concomitant with that right. (pp. 220, 221, 226.)

That a canal, rail-road or other like corporation or association, is public where the law secures to the public a right of passage thereon by paying a reasonable, stipulated, uniform toll. (p. 223.)

That an entry for exploration of a route for a road, canal, &c., is not a taking of the land, and that when nothing further is done, there is no right to compensation; but if the company commit wanton acts, or do unnecessary damage, they are trespasses, otherwise the law protects the entry. (p. 226, and cites 20 *Johns. R.* 104, 740. 7 *Johns. Ch. R.* 342—344. See, also, 9 *Barb. S. C. R.* 449.)

SEC. 16. In all cases of the exercise of the right of eminent domain, the law authorizing it ought to provide a legal remedy for the recovery of full payment of the damages to be assessed. (*Const. U. S. Amend.* art. 5. 7 *Pet.* 243—247.) The 6th section of the Constitution of the State of New-York, of 1846, secures this right; and in all cases where the compensation is not to be made by the State, it is to be ascertained by a jury, or by not less than three commissioners appointed by a court of record,

as shall be prescribed by law. Chancellor Walworth, in giving the opinion of the Court of Errors, in *Bloodgood vs. M. & H. Rail-Road Co.*, (18 *Wend.* 18,) speaking of paying for land taken by virtue of the right of eminent domain, says: "The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund; whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so." (2 *Denio's R.* 472.)

Where property is taken for public use, as a canal or other improvement, it seems that the owners of all adjacent lands ought to be compensated for all direct and material injuries arising from public works, and the constitutional provision in spirit would fairly reach them. (*Thacher vs. A. & S. Rail-Road Co.*, 25 *Wend.* 464. 18 *Ib.* 1. 2 *Denio's R.* 433, 450. 2 *Kent's Com.* 5th ed. 339, 340, n.)

SEC. 17. Municipal corporations, its officers or persons designated by a State law, or any person on whom the duty of public protection devolves, may, in a case of actual necessity, to prevent the spreading of a fire, the advance of an hostile army, the ravages of a pestilence or any other great calamity, destroy the private property of any individual, for the protection or safety of the many, without subjecting the actors to personal responsibility for the damages which the owner has sustained. (2 *Denio*, 474. 18 *Wend.* 129—131. 25 *Ib.* 173—175. 2 *Kent's Com.* 4th ed. 338.) In such cases, the sufferers can be compensated so far only as a statute, if any, shall provide. (2 *Denio*, 461.)

Such acts of destruction are not founded on the right of eminent domain, but of necessity. No compensation can be recovered, unless it is provided for by the local

statute law of the nation or State of our Union. (25 *Wend.* 157. 18 *Ib.* 126. 2 *Denio*, 461. 1 *Dall.* 362. 17 *Johns.* 52, 53.)

SEC. 18. Congress and the original thirteen States have maintained a uniform right of pre-emption of lands possessed by the Indians.

SEC. 19. *Congressional power of taxation.*—The Constitution of the Union (art. 1, § 8) confers on Congress power “to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”

Sub. 4 and 5 of art. 1, § 9, are in these words: “No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.” (See *Const.* art. 1, § 2, sub. 3.)

“No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.”

In *Hylton vs. the United States*, (3 *Dall.* 171,) and in *Loughborough vs. Blake*, (5 *Wheat.* 317, 323,) the Supreme Court of the Union decided that there was in Congress a general power of taxation co-extensive with the Union, territories and District of Columbia, as well as the States, but that no tax can be laid on exports or on any thing prohibited, or with any discriminations prohibited by the Constitution. These cases (5 *Wheat.* 323) show that Congress has clearly no power to exempt any State from its due share of the burden of taxation. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District

or territories. These cases settle that Congress, in levying taxes upon the States in the form of duties, imposts and excises, must levy them uniformly, and without discrimination, on all the States of the Union; and that when levied as a capitation, or any other direct tax, they must be apportioned among the several States according to the last preceding United States census, taken according to art. 1, § 2, sub. 3 of the Constitution. (*Ante*, § 3.)

SEC. 20. When, pursuant to a statute, land is taken for a highway or turnpike road, though the fee is appraised and paid for, upon their abandonment or discontinuance the soil of such road reverts to the owner and his successors, if he has sold the adjacent land, even if he has excepted such road in his deed. (15 *Barb.* 209. 3 *Kent's Com.* 432. 12 *Wend.* 372. 4 *Mass. R.* 427. 1 *Sumner*, 21, 37. 11 *Conn. R.* 60. 19 *Wend.* 33. 5 *Conn. R.* 311.)

If land is conveyed for such special purpose, the rule would seem to be the same.

The same rule is applicable to canals and rail-roads, but not to land taken and paid for in fee simple for an almshouse, or any like purpose. (3 *Selden's R.* 314.)

The Court of Appeals of New-York have held, that where the State pays for land in fee simple for a canal, the State is its owner if it happens to be abandoned as a canal. (1 *Kernan's R.* 314.)

SEC. 21. If a legislative grant be made to one corporation for a bridge, ferry, turnpike or other public work, which is not in its terms exclusive, a second grant to another corporation by the legislature would not be unconstitutional, if for a like object, and even if constructed so near to the former as greatly to impair, or even destroy its value, and this without making compensation to the first corporation for consequential injury. (11 *Pet.* 420. 17 *Conn. R.* 454. 1 *Am. Railway Cases*, S. & B. 237.)

All legislative and State grants are to be interpreted according to their plain meaning, and where two constructions may be fairly applied to them, or portions of them, that most favorable to the State shall be adopted. (8 *How.* 581.) And no exclusive right is ever taken by such grant by implication. (See above cases.) These principles are essential to the preservation of governmental authority and to the onward progress of the country.

The Supreme Court of Massachusetts, in the case of *The Boston Water-Power Company vs. The Worcester Rail-Road Company*, decided that the legislature of a State might, by virtue of eminent domain, authorize a second corporation to take, on full payment, such portion of the franchise and realty of the first granted corporation as the legislature should, by itself or its agents, deem necessary for a second public work. (23 *Pick.* 360.) The court held all property amenable to this high governmental power, whether granted by the State or not. (4 *Cushing's Mass. R.* 63. 4 *Gill. & Johns.* 1. 16 *Pick.* 87, 100. 1 *Am. Railway Cases*, S. & B. 578.)

## CHAPTER IV.

### NATIONAL AND STATE JURISDICTION, CIVIL AND CRIMINAL.

SECTION 1. All sovereign States have an independent moral and legal existence, with executive, legislative and judiciary powers vested in one or more tribunals. Each nation forms an entirety, a moral being, representing the aggregate rights and duties of all its citizens in reference to foreign nations. All departments of a nation must concur in maintaining the rights and performing the duties of a nation, though the executive is the international organ of communication. It is, therefore, important to define the civil and criminal jurisdiction of nations, in order to preserve international harmony and equity.

We have shown, in the first chapter, that to the sovereignty of every nation belongs the general and exclusive jurisdiction over its entire territory, with all its lands, islands, rivers, lakes, inclosed bays, like our Long Island Sound, our Narraganset, Chesapeake and Delaware bays, and extending outward a marine league from the coasts of a maritime nation. (*Wheat. Int. L. P. 2, c. 4, §§ 6—10.*)

This maritime curtilage, in the absence of any conflicting right, might be conveniently ascertained by considering all islands reaching to within six miles of the main land as forming part of the coasts, and the marine league would then be measured from the outer coast line of such islands. (*Wheat. Int. L. P. 2, c. 4, § 6. 11 Wheat. U. S. R. 45. Vattel, B. 1, c. 18, § 289.*) Mud or other islands near the main land are part of the coast.

. Chancellor Kent, in his Commentaries, with great judg-

ment suggests that a nation's curtilage might be estimated by taking the outer headlands of a country and connecting, by straight lines, the points, a marine league seaward from the outermost headlands of the coast, and assigning all of the sea within as forming the curtilage of a maritime nation.

The leading maritime nations all agree that this maritime curtilage shall extend a marine league from the coast. The Supreme Court of the United States, in the case of the *Mariana Flora*, (11 *Wheat. U. S. R.* 42—45,) have so adjudged. All civilians now agree in this doctrine.

SEC. 2. The jurisdiction of a nation, civil and criminal, according to the law of nations, covers its entire territory with its maritime curtilage, and extends to all persons and property within the same, with such exceptions as each nation chooses to allow. The consent of a nation is the true ground of exception from its jurisdiction. (*Wheat. Int. L. P.* 2, c. 2, §§ 6, 7, 8. *Story's Conf. L.* p. 24, § 23.) By common consent, now ripened into a rule of public law, kings, presidents and other national executives, ambassadors and public ministers, with their suites, are exempted from the local law of the countries where they reside and are accredited. This exception is also allowed when foreign armed ships or armies are allowed to pass over the waters of a nation's curtilage, or across the territory of a nation. (*Rutherford's Inst.* 2d Am. ed. 497. *Story's Conf. L.* p. 21, § 21. *Wheat. Int. L. P.* 2, c. 2 §§ 7—12. 7 *Cranch U. S. R.* 116. 1 *Wheat. U. S. R.* 238, 252.) Armies may be refused a passage through foreign territory, and armed ships may be excluded from the maritime curtilage of foreign States in their discretion. And foreigners, on board of their ships of war within the waters of a neutral nation, for acts done there or on land, may be proceeded against criminally in the courts of the neutral State, if the acts were done by them.



as individuals. (2 *U. S. St. L.* pp. 339, 340—342. *Wheat. Int. L.* P. 2, c. 2, § 9.)

States, in virtue of their sovereignty, may exempt by law citizens or foreigners from suits, to such extent as they shall think fit, unless prohibited by organic or constitutional law. (14 *Pet. R.* 745.)

Armies are not permitted to enter a neutral country without express permission of its sovereign or executive, on account of the great danger of injury to the country. (*Wheat. Int. L.* P. 2, c. 2, § 9. 4 *Hamilton's Works*, 48, 49.) But ships of war may enter the ports or waters of a neutral State, unless forbidden, if they demean themselves peaceably. But if they are prohibited from entering the waters, or hovering on the coasts of a neutral nation on account of any hostile act or interruption of the trade of the ports of such State, they must abstain from such ports, maritime curtilage and contiguous waters, or the neutral may use force to drive them off. (*Ib.* 2 *U. S. St. L.* 605—606. 1 *Am. St. Pap.* 261. See c. 1, § 9.)

SEC. 3. When an army enters a foreign State by consent, or armed vessels enter its waters by an implied permission of the neutral, the jurisdiction of the army and of the armed vessels remain in the military and civil tribunals of the nation to which they belong. (*Ante*, § 2. *Wheat. Int. L.* P. 2, c. 2, §§ 7—12.) No army or armed ship thus admitted by consent, express or implied, can lawfully commit any act of hostility there. (*Ib.*)

Public armed ships, driven into the ports of a friendly power by distress, are exempt from the local jurisdiction, if they behave peaceably. (*Ib.* 146. 2 *U. S. St. L.* 605.)

It has been maintained, and with good reason, that private ships, carried by force or driven by distress into foreign ports, ought not to be subject to the local juris-

diction if no attempt to trade is made there, and if no act is done there on board the ship in violation of the peace or the law of nations. (*Wheat. Hist. L. N.* 723. *Webster's Letter to Ld. Ashburton. Webster's Dipl. & Of. Papers*, pp. 83—91.) It is clear that, where a vessel is forced into a foreign port by distress, no penalty attaches to such entry. (*Wheat. Hist. L. N.* 735.) If any crime be committed there by any of the passengers or crew, they may be subjected to the *lex loci*. (2 *U. S. St. L.* 339. *Wheat. Int. L. P.* 2, c. 2, § 9.) A ship of war may, if permitted by a neutral, carry prizes into its ports, and hold them there. (5 *Hamilton's Works*, 132, 133. 7 *Ib.* 135.)

SEC. 4. A nation is under no obligation to grant a passage through its territory to a foreign army, and it may lawfully withhold the use of its maritime curtilage or contiguous waters to public armed ships. (2 *U. S. St. L.* 605, 606.) Upon this principle, the strait connecting the Mediterranean with the Black Sea is closed by the Porte against all foreign ships of war, though it is open to all merchant ships of all nations having friendly relations with the Porte. Our republic has exercised this power of excluding armed ships from our waters; and President Jefferson thought it reasonable that ships of war, seeking to capture merchant ships of an enemy trading to and from our ports, ought to be compelled to cruise beyond the Gulf Stream. This exclusion of these armed ships from our waters arose from their interference with the commerce of our ports.

Public and private armed ships may justly forfeit the right of entering a nation's waters by any hostile acts or proceedings near her coasts, injurious to her commerce. (*Wheat. Int. L. P.* 2, c. 2, § 9. 3 *U. S. St. L.* 449, § 9.) Nor is a foreign armed vessel permitted to harbor criminals in foreign ports, or within the curtilage of a

foreign State. In such cases, criminals may be arrested. (2 *U. S. St. L.* 339, 340, 342. *Wheat. Int. L.* P. 2, c. 2, §§ 9, 13.) According to Cæsar, it was a permanent rule of Roman policy to forbid to foreign armies a passage through Roman territory. And it was a wise one.

If a foreign army enters a neutral territory or an armed ship neutral waters, and there commits hostilities, the officers and soldiers are not liable, civilly or criminally, for the act is national. It may be sufficient cause of war or ground for demand of national satisfaction, but the law of nations allows no responsibility to attach to the officers and soldiers, the instruments of the nation committing the aggression. (See the opinion of Mr. Lee, Attorney-General of the United States, to the Secretary of State, of December 29th, 1797; and the letters of Daniel Webster, Secretary of State, and of Mr. Fox, the British Minister, relative to the *McLeod* case, copied into the report of that case in 25 *Wend. R.* 507, 512, notes. 26 *Ib.* 691, 692, 699 and onward.) In the *McLeod* case, the invasion of our territory and destroying the *Caroline*, and killing a man on board, was claimed to be an act of self-defence on the part of the British force, and the affair was properly considered by our able civilian, Webster, as exclusively a national matter.

Upon the same principle, if a public or private armed ship of a nation capture a neutral ship, and she is sent in for adjudication, the captors cannot be sued for the act in the courts of the neutral. It is a national act, and if the ship is wrongfully condemned or is not restored to the neutral owners, it becomes a national wrong, to be redressed by the political power. (3 *Dall. R.* 129.) But this exception does not extend to prize goods illegally captured, in violation of the jurisdiction of the neutral State, and brought within its territory or maritime curtilage by the captors. In such case, the courts of the neu-

tral may take cognizance of the matter, and award restitution of the goods so illegally captured. (8 *Wheat.* 352. *Wheat. Int. L. P.* 2, c. 2, § 9.)

## TERRITORIAL JURISDICTION.

SEC. 6. All persons within the territory of a nation, as well foreigners as other persons, owe obedience to its laws and are subject to them, as well as property found there. (9 *Wheat.* 370. 11 *Pet.* 138, 139. *Wheat. Int. L. P.* 2, c. 2, §§ 1, 2, 12, 13, 19. *Story's Conf. L.* §§ 18, 19, 550.) This general rule has limitations. This power includes pirates, and all piratical offences on the high seas and on the islands and coasts of a country. (*Wheat. Int. L. P.* 2, c. 2, §§ 12, 15.)

The Constitution of the United States has secured to the citizens of each State "all privileges and immunities of citizens of the several States;" has forbidden the States to pass *ex post facto* criminal and penal laws, and laws impairing the obligation of contracts, or taking life, liberty or property without due process of law.

A State may, indeed, if it can arrest the offender within its territory, or induce his extradition by the State authorities of his residence, punish him, though the crime was matured beyond its limits, and executed within them by innocent agents. (*Adams vs. People*, 1 *Comst. R.* 173.) Subject to constitutional limitations our States are municipal sovereignties, and the law of national comity applicable between nations is part of the public law of our Union, as between State and State, and as between any State and the District of Columbia, and a State and the territories of the Union. (1 *U. S. St. L.* 302. 2 *Ib.* 116, § 6. 13 *Pet.* 590. 4 *How.* 285, and cases therein cited. 2 *Pet.* 179, 586, 688. 10 *Ib.* 579, showing bills

of exchange drawn in one State on a drawee in another have the qualities of a foreign bill of exchange.

#### EXTRA TERRITORIAL JURISDICTION.

The sovereignty of a nation subjects to its laws and tribunals not only property and persons within its territory, but its citizens on the high seas and abroad; and pirates, for offences against the law of nations, may be brought within their action. (8 *How.* 493. *Wheat. Int. L. P.* 2, c. 2, §§ 6, 10, 11. *Story's Confl. L.* 2d ed. §§ 18, 19.)

The actual location of property, movable or immovable, within the limits of a State, subjects it to its laws and tribunals. Contracts made within the territories of a nation or State, or transactions occurring there, if brought before foreign tribunals for adjudication, are generally, by national comity, decided according to the *lex loci contractus*, or of the place of the transaction. (*Story's Confl. L.* §§ 18, 19, 251, 263, 267, 431. *Wheat. Int. L. P.* 2, c. 2, §§ 3, 5, 6, 7. 6 *How.* 550. 1 *Ib.* 28. 8 *Pet.* 361. 2 *Burr.* 1079, 1080. 8 *How.* 493, 494.)

Though nations have exclusive jurisdiction over their respective territories, and the force and effect there of foreign or extra territorial transactions, and the privileges of foreigners there depend generally on the *lex loci*, the law of nations, founded on the golden rule of the Gospel, has affixed limits to this territorial power, which all governments are deemed to assent to. This law of national comity excepts from the jurisdiction of the *lex loci* foreign ministers and diplomatic representatives, with attendants and effects, foreign kings, emperors, presidents or executives, foreign ships of war entering a nation's ports by presumed permission, or in distress, merchant ships forced

into foreign ports by necessity, a foreign army passing through a country by permission of the government.

The law of comity gives all nations the right, and imposes on all the duty, of free intercourse and commerce, and kind hospitality.

The same law confers the right on governments, with the correlative duty of enforcing foreign transactions, contracts and rights, not inconsistent with the Christian morality and the protection of the people of the respective national jurisdictions.

#### DERELICT PROPERTY.

SEC. 7. A conflict of the *lex domicilii* and of the *lex loci rei sitæ* of personalty generally arises among creditors, or among creditors and legatees, or parties claiming to succeed to the movables of the testator or intestate.

It sometimes happens that the deceased has no one to succeed to his movables, and they are, in fact, derelict by the law of the domicil, so far as private persons are concerned. In all such cases, by virtue of sovereignty, the States and nations, where such property is situated, at the death of the testator or intestate, seem to be the natural owners of the movables within their respective territories. As no equal title to actual possession of and sovereignty over the thing exists, it must prevail.

The nations of Europe have exercised the right of taxing all personal estate of deceased foreigners, on its withdrawal, and the respective States of the Union have the same power, unless restrained by our treaties. (5 *How.* 623. 8 *Ib.* 493, 494.) This right is legitimately founded on possession, protection and jurisdiction.

In Chapter I. we have explained when derelict property is subject to national and when to State sovereignty.

## FOREIGN CONTRACTS.

SEC. 8. The municipal law of nations and States of our Union is allowed an extra territorial effect, by national comity, in relation to foreign contracts.

As the law of the place of contract, or of the place where, by the terms of it, it is to be performed, enters into a foreign contract as part and parcel of it, and its governing effect is necessary to a just enforcement of it, it is a general rule of public law, adopted by national comity, that the *lex loci contractus*, or the law of the place of performance fixed by it, governs, in adjudications on foreign contracts, as to the capacities of the parties to contract, and as to the form, force and effect of such contracts, though remedies to enforce them in foreign nations and States of our Union must be according to the *lex fori*. (3 *How.* 514. 3 *Pet.* 77, 78. 6 *Hill*, 526. 19 *How.* 392. 8 *Pet.* 372. 13 *Ib.* 77, 78, 378, 379, 520. 6 *Ib.* 172. 1 *How.* 28, 33. 16 *Shep. R.* 206. *Wheat. Int. L.* P. 2, c. 2, § 7. *Story's Confl. L.* §§ 260, 263. 4 *Dall.* 419. 9 *How.* 413, 414. 8 *Ib.* 464, 465. 9 *Pet.* 627.)

It follows that, if in the country whose law governs the contract it is a mere mortgage or pledge of property, and unaccompanied with a personal liability, no action can be maintained in a foreign court to enforce a personal liability, as none exists.

If a contract is good by the law governing it, it is good and enforceable in all countries. (*Story's Confl. L.* §§ 242, 243, 262. 6 *How.* 550. 2 *Burr.* 1079, 1080.)

The last two cases show that a marriage, good and legal in one of our States, or in England, or in the place of contract, is valid everywhere, and ought to be so adjudged in all foreign tribunals, or in the courts of other

States of our Union, unless the marriage was incestuous, polygamous or against natural law. (10 *Met. Mass. R.* 452. 2 *Haggard's R.* 395, 437.)

If a stamp to a contract is not necessary by the *lex loci contractus*, but is so by the law of the place of performance, still the contract is valid in all countries, as the formalities of instruments are tested by the *lex loci contractus*. (*Story's Confl. L.* § 318.) That law governs as to the forms, proofs and authentications of foreign contracts. (*Ib.* §§ 260, 260 d, 261, 262, 631.)

As every nation is the guardian of its citizens, and bound to promote their welfare, national comity does not require a nation or State of our Union to recognise or enforce contracts against good morals, against its policy, or which are prejudicial to its interest or to those of its citizens. (11 *Wheat.* 261. 7 *Paige's Ch. R.* 616. 3 *Pet.* 589. 1 *Texas R.* 203. See last sec. ch. 5. *Story's Confl. L.* §§ 244, 246, 258, 259.) Polygamy and other like contracts would not be held valid by the tribunals of a Christian nation.

If a contract, by the law governing it and the parties, becomes discharged by the statute of limitations, a removal of the parties, or either of them, to another country, ought not to revive it, and it is against national comity for a foreign tribunal to revive and enforce such defunct contract. (6 *Pet.* 291. 16 *Ib.* 493. 3 *Ib.* 290. 4 *Wheat.* 207.)

The interpretation of foreign contracts must be according to the laws and customs of the place of contract, unless it is to be performed in another nation or State of our Union. (13 *Pet.* 77, 78. 5 *How.* 315. 6 *Paige's Ch. R.* 627. *Story's Confl. L.* §§ 270, 272, 276, 278. 9 *Pet.* 627.)

In *Hyde vs. Goodenough*, (3 *Comst. R.* 269,) the New-York Court of Appeals held, that it is a general rule of



international law that the rights of parties to a contract, as distinguished from their remedies, are to be determined by the law of the place where the contract is to be performed. And that if a contract be made in one State or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation and effect of the contract. The general rule, however, has its exceptions; one of which is, that where a contract is declared void by the law of the State or country where it is made, it cannot be enforced as a valid contract in any other, though by its terms it was to have been performed there. If the contract is void and illegal at the place of contract, it must, by true comity, be so held by the courts of the country where it is payable or performable, even though it would have been valid if made there. Such a contract, illegal and void by the *lex loci*, by comity ought to be so adjudged in all foreign countries by their tribunals. (*Ib.* 270. *Wheat. Int. L.* P. 2, c. 2, §§ 6—9, 12. 14 *How.* 429.)

As to marriage contracts, if legal by the *lex loci*, as a general rule they are valid, though by the law of the domicil of the parties they might be invalid, as if one of the parties by the latter law were prohibited from marrying.

This arises from the principle of public law that personal disabilities are confined to the territory of the power inflicting them, and that they have no extra territorial effect. (2 *Blatchford's R.* 59.) But no nation is bound by comity to recognise any foreign marriage contracts of an incestuous or polygamous character, as the Gospel is the basis of national comity, and it rests upon the Golden rule. Huberus and Wheaton lay down this as the true rule of public law. (*Wheat. Int. L.* P. 2, c. 2, §§ 7, 8.)

Marriage is a civil contract. (10 *How.* 174. 18 *Ib.* 349. 8 *Paige's Ch. R.* 574. 19 *How.* 254.) The actual marriage may be inferred from acknowledgment of the relation by the parties living as man and wife, and the usual facts attending the relation. (*Ib.*)

In *Curtis vs. Leavitt*, (15 *N. Y. Ap. R.* 1 *Smith*, 9, 91, 230, 296,) it was held by the New-York Court of Appeals that bonds of a New-York moneyed corporation, payable in sterling money in London, and made for sale there, were English contracts, and being valid by British law, were enforceable in the State of New-York, as they were not usurious by British laws. In the same case, that court held that a loan of money by a negotiation, partly made in Philadelphia of banks there, and partly in New-York, the money being payable at a Philadelphia bank, that the contract was a Pennsylvania one, and governed by the law of that State, and that the contract would be enforced or invalidated agreeably to that law.

In *Arendell vs. Arendell*, (10 *Ann. Louis. R.* 566,) the Supreme Court of Louisiana held, that where parties were married in one State, intending to reside in another, and actually fixing their domicil in the latter State, the laws of the latter govern as to property rights arising from such marriage, and not the laws of the place of marriage. The same court so held in *Percy vs. Percy*. (9 *Ib.* 185.)

In *Brook vs. Brook*, A. D. 1857, (3 *Smale & Gifford Ch. R.* 481, 524,) it was held that a marriage between an Englishman and Englishwoman, the sister of his former wife, contracted in Denmark, where such a marriage was valid by the Danish law, was illegal and void, because the British statute forbade all marriages between persons domiciled in England holding such a relation. This decision rests simply on the British statute and not on international law.

In *Thatcher vs. Morris*, (1 *Kernan's R.* 438, 439,) the

New-York Court of Appeals held, that all dealings in respect to lotteries are unlawful in the State of New-York, but that, as lotteries were for a long period legal there, that they would not be deemed founded on moral turpitude, and that inter-state comity required that the courts of New-York should enforce foreign lottery contracts if valid in the place of contract and of performance, and that a party suing on such contracts might aver and prove such foreign law, and that it was incumbent on him so to do in order to recover on such contracts, where, by the *lex fori*, such contracts were illegal and void.

In *Merchants' Bank of New-York vs. Spalding*, (5 *Seld. R.* 53, 54,) the Court of Appeals held, that the citizens of one State, in making contracts in another, are not chargeable with a knowledge of the laws of such State or country. (See 10 *Wend.* 75, 78.)

In *Bank of United States vs. Donnelly*, (8 *Pet.* 362, 372, 373,) the Supreme Court of the United States held, that the legislature of a State, as to the obligation or remedy on contracts, has no binding force beyond its territorial limits, and that its authority in other States depends upon principles of international comity and a sense of justice. That the general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts are to be governed by the law of the country where the contracts are made, or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought, that is, by the *lex fori*. That the statute of limitations of the *lex fori* can alone be pleaded, and not that of any other State or country, and that though covenant may be brought on an unsealed contract made there, yet the *lex fori* governs the form of action and remedy in the tribunals of other States and countries. Hence, an instrument negotiable and suable by the assignee in the place of contract, may be incapa-

ble of negotiability by the *lex fori*, and if so, the remedy must be in the courts of the State or country where the suit is brought, and must be according to its own laws.

That hence, an instrument with a scrawl is considered a sealed one in some States, and in others, as New-York, it is held to be an unsealed one, and must be sued on in New-York as an unsealed paper. The court refer, with approbation, to *Andrews vs. Harriott*, (4 *Cowen*, 508,) and to *Warren vs. Lynch*, (5 *Johns. R.* 239,) to support this doctrine.

#### FOREIGN MORTGAGE.

In *Bronson vs. Kinzie*, (1 *How.* 315,) it was held by the Supreme Court of the Union, that where a mortgage on Illinois lands was given to secure a debt payable in New-York, that the laws of Illinois, as they were at the date of the contract, governed the contract as to its effect, its legal and equitable obligation, and that a mortgage savoring of realty is governed by the local law, and not of the State where the money was payable.

#### FOREIGN CONTRACTS TO CONVEY LANDS.

In the case of *Kennett and others, apts. vs. Chambers, resp.*, decided by the Supreme Court of the United States, (14 *How.* 38,) a bill was filed in the District Court of the United States for the State of Texas, to enforce specific performance of a contract made in 1836, at Cincinnati, Ohio, by General Chambers, to convey a large tract of land lying in Texas, to Kennett and others, in consideration of heavy advances made by them at Cincinnati, to General Chambers, to enable him to raise volunteers to carry on the war of Texan independence against Mexico, with which latter power the United States were at peace,

and then had a treaty of amity and commerce. The United States officially recognised the independence of Texas in 1837, and after the contract and the advances under it. On appeal, the Supreme Court of the United States in this case held, that at the time of the contract, Texas, not having been recognised by our President as a nation, was, as to our government and its citizens, a part of Mexico, and that the contract was a violation of the duties imposed by our treaty with Mexico, of our neutrality laws, as well as of the obligations of a neutral peaceful government, and was, therefore, illegal and void, and that no court of the United States could enforce it. The court decided that our citizens are parties to the acts and policy of their own government, and that as to them, Texas, in reference to Mexico, became a nation in 1837, when the President officially recognised Texas. That the recognition of Texas was an executive and not a judicial question, and that the courts are bound by the action of the President, to whom the recognition of nations exclusively belongs. That the land being situate in Texas, whose law allowed such contracts, could not help the contract as it was made in Ohio, in violation of the policy and laws of the United States. The court referred to 4 *Cr.* 272; 3 *Wheat.* 324; 9 *Moore Eng. Com. Pl. R.* 586, and 1 *Kent's Com.* 116, as sustaining the opinions of the court. This case settles that all advances of money made in the United States, in violation of our neutrality laws, are illegal, as well as contracts founded on them, and that no court in the United States will enforce any right founded on such void contracts.

## EXCHANGE, USURY, &amp;c.

In *Andrews vs. Pond*, (13 *Pet.* 77,) the Supreme Court of the United States say that, as between our States,

“there is no rule of law fixing the rate which may be lawfully charged for exchange.”

The same rule is true as to exchange between nations.

Hence, if a sum charged is really meant for exchange, and not as a cover for usury, it depends on the agreement of the parties, in the absence of any positive law.

The court held, that if a bill be drawn in one State, payable in another, with a sum added for difference of exchange nominally, but really for usury, in violation of the *lex loci contractus*, and exceeding the legal rate of interest in both States for the time of forbearance, the transaction is governed by the law of the place of contract, and if void by that law, it must be so held in every State and in every court.

And the court say, (p. 78,) that the *lex loci contractus* governs, though, by the terms of the agreement, security is to be given for the debt on lands in another State. (See, also, 10 *Wheat.* 383.)

#### FOREIGN GUARANTIES.

If a guaranty is signed in one country, addressed to a merchant in a foreign State or nation, and to be there executed, the law of the latter governs its construction and effect. (1 *How.* 182.)

The rule is the same among the States of our Union. (*Ib.*)

In *Boyle vs. Turner, et al.*, (6 *Pet.* 641,) a vessel of Boyle, of Baltimore, in Maryland, appears to have been attached in New-Orleans for a debt, and his friends and consignees, Zacharie & Turner, became surety for the recovery, and released the vessel, and Boyle, at Baltimore, wrote to them that he would indemnify them fully, and ratified their act. They had to pay a large sum at New-York for their liability. Boyle took advantage of a

Maryland insolvent law, and was discharged. Afterwards they obtained in Maryland, by confession, a judgment for the amount, with a memorandum, by agreement made part of the record, that it was subject "to the legal operation of the defendant's discharge under the laws of Maryland."

It was held by the Supreme Court of the Union, that it was a Louisiana contract, and not affected at all by the Maryland discharge. That the advances being made by Boyle's authority at New-Orleans, that was the place of payment. (pp. 644, 645.)

If a judgment is obtained in one State on a contract made in another, and between two of its citizens, and the debtor is afterwards discharged in the latter, the Supreme Court of Connecticut has held that the discharge does not affect the judgment, and that execution may be issued on it. (3 *Conn. R.* 523.)

#### FORMALITIES OF FOREIGN CONTRACTS.

In transferring or assigning foreign notes, bills and contracts, the formalities of the *lex loci contractus* are essential to pass title. (*Story's Confl. L.* § 353 a.)

As to foreign bills and notes, the time, place and mode of protest must be according to the law of the place of payment. But as to the necessity of demand and protest, and when notice thereof may be omitted, these depend on the *lex loci contractus*, as part of the agreement of the parties. (*Ib.* §§ 360, 361.)

Bills of exchange, drawn by nation upon nation, are not subject to the law-merchant. (5 *How.* 382, 400.)

Contracts relating to realty, to the assumption of the debts of a third person, and other things, are in some countries required to be in writing to be valid. In others, contracts of the same sort may be allowed to be

made by parol. Any personal contract, good by the *lex loci contractus*, is generally valid everywhere, by national comity. (*Story's Confl. L.* § 262.)

If injuries be done in one State to the person or personal property of any person, and a suit for the wrong be brought in another State, the law of the former governs as to the right of the case, and the *lex fori* as to the remedy. (1 *How.* 26. 8 *Pet.* 361.)

All actions for injuries to realty must be brought in the State or nation where it lies. (6 *Hill*, 82, 86, 87.)

All persons, as a general rule, not specially disabled by the *lex fori*, may of right sue in foreign courts. The same is true of sovereigns and foreign corporations. (13 *Pet. R.* 519, 588—590. 8 *Paige's R.* 527. 2 *Hill's R.* 159. *Story's Confl. L.* § 565.)

SEC. 9. Actions personal by the common law may be brought in the courts of any nation where the defendant can be found, and prosecuted, but real or mixed actions must be instituted in the *forum rei sitæ*. (6 *Hill's R.* 82, 86. *Story's Confl. L.* § 554.)

The acquisition of rights in real property are prescribed and regulated by the laws of the country where the property is situated. This exclusive control of realty is an essential element of sovereignty. No other community can interfere with the method by which real property may be acquired or held, the duration or quantity of interest in it, or the conditions to which the enjoyment is subject; but a contract, deed or mortgage of realty abroad, may, nevertheless, be within the reach of the laws of the State in which the instrument was executed, or the party to it is found and personally served with process there. (23 *Barb.* 79, 80. 16 *Pet.* 57.)

In *Silliman & Co. vs. White Rock Mining Company*, (3 *Wood & Minott's R.* 541—551,) it was decided by the Circuit Court of the United States for Rhode Island, that



where the centre of the Pawcatuck River was the dividing line between the States of Connecticut and Rhode Island, and of certain mill-owners on the opposite banks, and a common dam was built across the river for equal common use, and those in Rhode Island constructed a canal to divert the water, so that the Connecticut mill-owners, by diversion of part of the water, lost its use at a second and lower dam, an action would lie for such injury. That the using of either party of more than his half of the water, to the injury of the opposite owners, gave a right of action for damages sustained. (pp. 543, 544.) That an interest in the opposite owners exists in the water, and its use beyond the centre of the stream. That this right may be injured. That another injury may be to the mills, to which the water right is appurtenant.

The court held that the wrong-doer may be sued where the mills are situated, if they are injured by an act in another State or country, (p. 545; 9 *Pick.* 61,) though the law of the place where the real estate is injured governs in actions for damages.

The court held that the laws and tribunals of Rhode Island might also be resorted to, civilly and criminally, in this case, for the nuisance. (p. 546.)

The court say that there are crimes, as well as civil suits, which may be prosecuted in two States. Such, say the court, is the case of theft continued from one State to another, or the felonious intent indicated in both, or a burglary in one State being a larceny in another, where the property was removed, but no house broken into.

So, if one fires a gun in one State, which kills an individual in another State, there may be the offence of using a deadly weapon in the first State, and committing murder by the killing in the second State. Again, there is sometimes an election in which to prosecute. Thus, if a

blow be given in one county, and death follows in another, an appeal of murder lies in either. (*Dyer*, 40. 5 *Coke*, 426. 7 *Ib.* 59.)

If two acts are necessary to constitute an offence, and one is done in one county and one in another, the prosecution may be in either.

The court granted an injunction to stop the diversion of water by the canal.

## LEX FORI.

The *lex fori* governs as to remedies. (9 *How.* 413. 6 *Wend.* 475. 2 *Conn.* 626. 4 *Ib.* 526. 8 *Pet.* 361. 13 *Ib.* 312. 2 *Mason*, 151. 3 *Ib.* 88. 3 *Johns. R.* 263. 3 *Story on Const.* § 1379.) The question as to what laws relate to the remedy, and what enactments of State legislatures impair an existing contract, and violate the prohibition of the national constitution, is often a matter of difficulty.

The decisions of the Supreme Court of the United States have settled, that where a State law exempts from the lien specially granted by contract any of the property pledged or mortgaged, or changes the effect of the contract as to its obligation, the State law impairs the contract and is void. So a stop law, that deprives a party of his legal remedy altogether for an unusual period, and thus defeats for a time his rights, and stops the course of justice and the enforcement of an existing contract, is also a violation of the Constitution, and void. (3 *Story on Const.* §§ 1375, 1379.) But that court has decided that State laws regulating remedies, leaving the obligation of contracts in full force, are legal. (*Ib.*) The Supreme Court of the Union has decided that the *lex fori* governs the remedy, and that State recording laws and State statutes of limitations may destroy existing rights where there is opportunity of complying with them; that State

non-imprisonment laws relate to the remedy, and are legal, and that a right perfected by adverse possession of personality in one State, remains a perfect title in another; and from analogy and upon principle, it would seem that, where there is no lien expressly stipulated by contract, upon household property, real and personal, and the tools of a man's trade, and State laws exempt them to a limited sum or quantity, such laws ought to be held a regulation of the remedy, and not a violation of the obligation of the contract. Such laws, like the abolition of imprisonment for debt, flow from the benign principles of Christianity, and seem to relate to the remedy, and to be sustained by sound public policy and the spirit of the age.

In *Morse vs. Goold*, (1 *Kernan's N. Y. R.* 288—293,) it was held by the New-York Court of Appeals, that a State law, exempting certain property of a debtor from execution, applied to existing as well as future judgments, and was a constitutional law, and did not affect the contract of the parties; but that the act in question, securing certain property to defendants and their families, was a law regulating remedies merely, like statutes of limitations and laws abolishing imprisonment for debt. The court held, that as the creditor had no lien on the property by execution, no lien or contract right was taken from the creditor, and that the case was clearly distinguishable from *Bronson vs. Kenzie*, (1 *How. U. S. R.* 411,) and *McCracken vs. Hayward*, (2 *Ib.* 608.) The court approved the doctrine of the Supreme Court of the United States in the case of *Bronson vs. Kenzie*, that a legislature may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments.

Upon this ground, the act of the State of New-York abolishing the right of distress for rent, has been held

legal and constitutional, as regulating the remedy. Upon principle, the legislatures of our States may exempt homesteads, and such books, implements and articles as may be judged necessary to preserve the existence of families and insure their comfortable sustenance. The extent of such exemptions is a matter depending wholly on legislative discretion, and it cannot be reviewed by the courts unless the contract is impaired, some existing lien destroyed, or the creditor's rights are substantially taken away.

Where remedies are changed, though creditors may be affected more or less, the law will be valid, subject to constitutional limitations. If this were not so, the old barbarous system of imprisonment for debt, the relict of ancient barbarism, handed down to our republic from Roman despotism and European tyranny, would still cover our land with oppression. American jurisprudence, instinct with the benign principles of our free and humane institutions, has a power of improvement, and their course is excelsior—it is onward.

In *Bard vs. Poole*, (2 *Kernan*, 495,) the New-York Court of Appeals held, that a Maryland corporation having power, by their charter, to borrow money in the State of New-York, and to mortgage land in that State to secure it, might legally make a loan there at seven per cent., and mortgage land there to pay it, though the Maryland legal rate of interest was six per cent., and that a mortgage to secure such a loan on New-York lands owned by the company, was not usurious, but legal and valid. That the law of the place where the contract was made and to be performed governed the contract, as the company had the legal power to make it, and that the usury law of Maryland did not govern the case.

A bond and mortgage made and executed in a State or country where the interest is seven per cent., payable to a man in another country, where interest is five per

cent., and where the money is advanced, the bond and mortgage bearing seven per cent. interest, and the mortgage being on land in the seven per cent. country, are valid, on the ground that they were made in reference to the country where the mortgaged premises were situate. (1 *How.* 315. 6 *Paige's Ch. R.* 627. *Story's Confl. L.* §§ 287 a, 293 b, c.)

So if a loan be made in a State where the interest is seven per cent., on a note carrying interest at eight per cent., payable in a State where that is the lawful interest, the contract is valid. (13 *Pet.* 73, 78.)

If a contract to loan money is made in a State where the legal interest is six per cent., at higher rate of interest, and no place of payment stated, and a mortgage is given on lands in another State, if the contract of loan is void for usury by the *lex loci contractus*, it will be void in all other States. (10 *Wheat.* 283, 369, 370, 381. *Story's Confl. L.* § 287 a.)

If a usurious loan be made in one State, and a new security be afterwards given in another State for it, less the usury purging it from it, the new security will be valid. (10 *Wheat.* 392.)

If to an existing debt on taking a new security there be added, under pretence of exchange between States or nations, a sum for usury, making void the bill by the *lex loci contractus*, it is void everywhere. (13 *Pet.* 16.)

#### INTEREST ON ADVANCES.

If a merchant in one country requests a merchant in another to buy goods for him, and he does so, the money must be replaced at the place where the money or security was advanced, and at the legal rate of interest there. (*Story's Confl. L.* § 287. 6 *Pet.* 635, 641.)

So, if a merchant or other person in one State advances there, by order of one residing in another State or nation,

money, it is to be repaid where advanced, with the interest allowed there by law. (3 *Wheat.* 146.)

In bonds to the United States, they are deemed delivered at the seat of government, and carry interest accordingly. (6 *Pet.* 172. 7 *Ib.* 435.)

The general rule as to interest on contracts carrying interest is, that the law of the place of payment or performance governs. (13 *Pet.* 76. *Story's Confl. L.* § 291. 2 *Kernan's N. Y. App. R.* 495. 1 *Paige's Ch. R.* 220, 225. 3 *Wheat.* 146. 6 *Hill R.* 528. 17 *Johns. R.* 518.)

If a merchant in one country consigns goods to a merchant in another, to sell there, or if the contract of consignment be so made in the country of the consignor, with a view to a sale in the country of the consignee, in such case, if the sale be made as agreed, and the consignee fail to remit the proceeds to the consignor as directed, the law of the country of the consignee governs as to the contract, and its rate of interest will be allowed. (17 *Johns. R.* 511, 518.)

When a contract is made in one country and payable in another, and the law of the latter allows a depreciated paper currency to be a lawful tender, it is a question of fact for a jury to say, whether the contract meant specie or such legalized paper currency. (4 *Dall.* 325.)

In *Cook vs. Litchfield*, (5 *Selden's R.* 290,) it was held, by the New-York Court of Appeals, that a note made, dated and endorsed by an accommodation endorser in Michigan, and which was payable in New-York, and was there negotiated by the maker, was to be deemed a contract made in New-York by the maker and endorser.

In *Musson & Hall vs. Lake*, (4 *How.* 262; 16 *Curtis' Decis. S. U. S.* 103,) the Supreme Court of the United States held, that where the acceptor lived in Louisiana, and the endorser in Mississippi, the contract of the latter was governed by the law of Mississippi; and that as it

required presentment of the bill to charge an endorser, the latter was not liable without presentment, even if the law of Louisiana dispensed with it. Each contract is independent.

The Supreme Court of the United States, in *Andrews vs. Pond*, (13 *Pet.* 77, 78,) say: "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

#### BILLS OF EXCHANGE AND PROMISSORY NOTES.

These, as to making, endorsing and accepting, are governed by the law of the place of each act, as they form independent contracts. Notes when endorsed, and drafts accepted, stand on the same footing, the makers and acceptors occupying the same positions as principal debtors. (13 *Pet.* 136, 148.) The Supreme Court of the United States, in *Musson vs. Lake*, (4 *How. R.* 273, 278,) decided that where a bill of exchange was drawn and endorsed in Mississippi upon a drawee, who accepted the bill, payable in Louisiana, the contract of the drawer, endorser and acceptor were governed by the law of Mississippi or Louisiana, where each party contracted. And the court add: "The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New-Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and endorsers resided in Mississippi; the bill was drawn and



endorsed there, and their liabilities, if any, accrued there. The undertaking of the defendant (endorser) was, as before stated, that the drawers should pay the bill, and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit is brought, and is now depending. The construction of the contract, and the diligence necessary, must, therefore, be governed by the laws of the latter State." (*Ib.* p. 278. *Story's Confl. L.* 2d ed. 261, § 314; p. 362, §§ 315, 316 a, b.)

According to these authorities, bills of exchange and endorsed promissory notes, where the parties have made, accepted or endorsed in different nations, or in two or more States of our Union, the construction and effect of each contract is governed by the law of the place where each act was done. Hence, as the laws of our States and of nations differ as to the nature and extent of the liabilities of such parties, each contract must be enforced in a foreign as well as domestic tribunal, according to the *lex loci contractus*. (*Ib.*)

The principle applicable to such cases rests on the doctrine that each party stipulates to pay, absolutely or conditionally, at the place of his contract, unless he expressly agrees by the instrument upon a different place of payment.

USURY ON BILLS OF EXCHANGE.

The Supreme Court of the United States has decided that a bank, allowed by its charter to deal in exchange, may charge on bills the market rates of exchange, and that it is not usurious. (13 *How.* 152.)



DEFENCES TO FOREIGN CONTRACTS AND RIGHTS FOUNDED ON  
FOREIGN LAWS.

SEC. 11. As a general rule, a defence to or discharge of a foreign contract, good by the *lex loci* where it was made, or where it was to be performed, will be held in the courts of other nations of the same validity, wherever the same may be litigated. (2 *Kent's Com.* 3d ed. 459. 1 *Bos. & Pul.* 141. 12 *Wheat.* 358. *Story's Confl. L.* §§ 331, 332. 4 *Dall.* 325, 409. 2 *Yeates' Penn. R.* 99.)

As between citizens of the States of our Union, a discharge of a contract, good by a State law having jurisdiction of debtor and creditor at the time of discharge, is valid in other States, unless the constitutional prohibition against State laws impairing the obligation of contracts is violated. (12 *Wheat.* 358. 12 *Pet.* 623. 5 *How.* 307, 308, 310.)

Where a title to personalty under the *lex loci* of its locality has become perfect, by comity it will be so held in other countries. This is the doctrine applied to the States of our Union by the Supreme Court of the United States. (11 *Wheat.* 361, 369, 371, 372.) The same rule has been laid down as to the effect of a statute of limitations by the Court of Errors and Appeals of Mississippi. (1 *How. M. R.* 188, 189.)

In *Sturges vs. Crowningshield*, (4 *Wheat.* 207,) the Supreme Court of the Union say: "Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed than dispense with its performance."

A statute of limitation that cuts off existing rights of action without leaving a right and opportunity of enforc-

ing them, would, of course, be unconstitutional. (*Ib.*) With this qualification, the running of a statute of limitations ought to be considered as legal evidence of the satisfaction of a contract or of the final ending of any transaction, and its entire settlement. A statute of limitations is founded upon public policy, and in its application to realty and personalty it ought to be construed in all cases a legal extinguishment of the right or claim affected by it. Acting on this principle, the legislature of New-York enacted, by the recommendation of the Commissioners of the Code of Procedure, that when "the time for commencing an action on contract shall have expired, the cause of action shall not be deemed revived by an acknowledgment or new promise, unless the same be in writing, subscribed by the party to be charged thereby."

There is some variety of decision in different State and foreign courts on some of the above doctrines.

The Supreme Court of the United States have settled the doctrine that a State, having jurisdiction of both parties to a contract or transaction, and by its law having cancelled it, or forbidden all remedy in its courts, it is against comity in any other State to revive a defunct right, and that the defence perfect in such State ought to be so held in the courts of every other State in the Union. (11 *Wheat.* 361. 4 *Ib.* 207. 4 *Dall. R.* 325, 419. *Cox's U. S. Dig.* 423, 424. 1 *How.* 51. 5 *Ib.* 87. 6 *Pet.* 291. 3 *Ib.* 290. 16 *Ib.* 493.)

The *lex fori* of every nation, and of the States of our Union, regulates the time and mode of bringing suits in their respective courts. (13 *Pet.* 312. 9 *How.* 413, 414.) This is a settled principle of international jurisprudence. (*Ib.*)

A foreign law legally suspending for a given period a right, as between its own citizens, should by national

comity be so considered in the courts of other countries and States of our Union. (4 *Dall.* 419.)

A bankrupt discharge by a tribunal of a nation or State of our Union, having jurisdiction of both parties, is generally valid, and annuls a contract. (*Post*, § 45.)

If a creditor is not a citizen of the same country or of the same State of our Union where the debtor obtains an insolvent or bankrupt discharge, he will not be affected by it, unless he accepts a dividend or assents to the proceeding by some act giving jurisdiction. (3 *Wend. R.* 538, 549. 12 *Wheat.* 358, 359, 369. 6 *Pet.* 635. 5 *How.* 308, 309.)

By the Constitution of the Union our States are prohibited from passing laws that shall impair the obligation of contracts. Hence, no State insolvent law, even between citizens of the same State, can discharge a contract existing at the passage of the law. (17 *Johns. R.* 108. 4 *Wheat.* 122, and *post*, § 45.)

In *Cook vs. Moffat*, (5 *How.* 308,) the Supreme Court of the United States decided, that when a State law is adjudged by that court unconstitutional and void, all State courts are bound by the decision, and must carry it into effect, as between its own citizens as well as between citizens of different States. That State insolvent laws can have no extra-territorial effect as to non-resident creditors.

#### MOVABLES.

SEC. 12. As to personal or movable property, the general rule of international law adopted by national comity is, that it follows the law of the domicil, and that all transfers of it are governed by the State. (3 *How. R.* 483. 19 *Ib.* 392. *Story's Conf. L.* §§ 377, 379.) It is a rule of convenience. Movables, in a country different from that of the owner's domicil, for the purpose

of devise, succession, alienation, or any act of the owner, are generally subject to this rule. (*Ib.* §§ 380—383.) This law changes with the owner's change of domicil. (*Ib.* § 381.)

If movables are attached firmly to the freehold, they become subject to the *lex loci* like immovables. (*Ib.* § 382.)

The stock of incorporated companies are subject to the *lex loci* of the incorporating State; and so of any other movables situated in a State, the law of which prescribes a particular mode of transfer. (*Ib.* § 383.) But the general rule is, that a transfer of movable property, good by the law of the owner's domicil or of the place of contract, is valid, wherever the property may be situated. (*Ib.* § 384.)

An agreement to transfer foreign stock, good in the place of contract, would pass the equitable title to it, if the law of the State where the corporation exists did not prohibit the assignment of such equitable interests. (*Ib.* §§ 327, 384. 3 *How.* R. 483, 510—513.)

SEC. 13. If the law of the domicil or of the place of contract conflicts with that of the *situs*, the municipal law of the latter, by virtue of sovereignty over the thing, will prevail. So, if by the law of the domicil or of the place of contract actual delivery of a movable is not necessary, in order to complete a sale and defeat an attaching creditor, but is so by the law of the *situs*, the latter prevails. (*Story's Confl. L.* §§ 388—390. 14 *Marten's R.* 103. 3 *How.* 483.)

As to movables generally, a transfer or lien by the act of the owner, valid by the law of the owner's domicil or of the place of contract, is, by comity, held to be so in all other States and nations. (3 *How.* 514. 19 *Ib.* 392. 16 *Conn. R.* 127.) In case of wills of personalty or of intestacy, the law of the owner's domicil or residence at his

death governs as to the forms, solemnities and effect of such wills, and the distribution of his personalty, wherever situated. (*Ib.* 4 *Barb. S. C. R.* 519, 520. 3 *Story's C. C. R.* 765. *Wheat. Int. L. P.* 2, c. 2, §§ 5, 6, 17, 20. *Story's Confl. L.* 2d ed. §§ 465, 472, 473.) A will of personalty, executed according to the law of the place of its locality by an owner residing in another State or nation, may there be held valid, if the law of the locality so ordains.

Domicil is the place where one resides with the intention of remaining. Where a father dies in one State or country leaving minor children, the place of his death is that of their domicil until they come of age, when they may acquire a new domicil.

If such minors die under twenty-one years of age in a different State or country, the law of the father's domicil at his death governs the distribution of and succession to their movables.

By national comity movables are deemed to appertain to and go with the owner, and if he aliens them according to the law of the place of transfer, or makes a will according to the law of the domicil of the owner at his death, the act is good to transfer the property wherever situate in other countries. And in case no will is made, such personalty is disposed of by the law of the owner's domicil at his death.

But the law of the actual *situs* or locality of personalty may regulate its transfer and disposition to the same extent as realty. (8 *How.* 493, 494. *Story's Confl. L.* §§ 512, 550. 4 *How.* 498, 499. 3 *Ib.* 483. 9 *Pet.* 627.) This enables each State, where movables are located, to subject them to attachment, execution, &c., for the security and benefit of its citizens or of suitors in its courts. (*Wheat. Int. L. P.* 2, c. 2, §§ 6, 19. 7 *Cranch*, 423.) In *Robinson vs. Bland*, (2 *Burr. R.* 1079,) Lord Mansfield said: "In

every disposition or contract where the subject-matter relates locally to England, the law of England must govern. Thus, a conveyance or will of land or mortgage, a contract concerning stocks, must be all sued upon in England, and the local nature of the thing requires them to be carried into execution according to the law here."

Upon this principle, Chancellor Walworth held a mortgage on New-York land to a man in London, bearing 7 per cent., enforceable in the Court of Chancery of that State, though the contract, by the law of England, was usurious and void. (6 *Paige's Ch. R.* 627.) Where a person in one State gives a power of attorney to sell movables or personalty in another State, where the property is situate, the sale must conform to the law of the latter. (9 *Pet.* 627.)

With a view to protect its own citizens, it is settled that a nation or State of our Union will not allow a foreign executor or administrator to take charge of movables or personalty, or sue for debts belonging to the deceased, and located within such nation or State, without first taking out letters of administration in such nation or State. (*Story's Conf. L.* 2d ed. §§ 512, 513. *Wheat. Hist. L. N.* 189. 3 *Pick.* 128. 4 *How.* 467. 16 *Conn. R.* 127. 15 *Pet.* 6. 7 *Conn. R.* 68. 9 *Wend.* 426. *Post*, §§ 31, 32. 16 *Pet.* 56.)

In *Grattan vs. Appleton*, decided by Justice Story, in 1845, in the Circuit Court of the United States for Massachusetts, it was held, that a letter written and dated at Boston, by a British subject, domiciled in New-Brunswick, a British province, to a resident of Boston, to pay certain moneys after his death to certain persons, was in its nature testamentary, and that it was a settled rule, "that the law of the place of the testator's domicil is to govern in relation to personal property, although the will may have been executed in another State or country, where a

different law prevails." It was held that the law of New-Brunswick governed the case, and that the letter, a testamentary disposition of property after the writer's death, not being a valid testamentary disposition of that law, the same was void, and the administrator was entitled to the funds. (3 *Story's C. C. R.* 765.)

As to personalty located in a foreign country, if the testator, either in that or any other country, executes a will agreeable to the law of the *situs* of the property, such will might properly be held in the tribunals of the latter a valid will, and enforced there. This would not violate national comity. Generally, nations and States, as to personalty belonging to foreigners, only control it so far as to protect the rights of domestic creditors, or others seeking remedies in their courts.

In *Beman vs. Bufford*, (13 *Eng. L. & Eq. R.* 465,) it was held in England, that a mortgage there executed, must conform to the laws of Demarara, where the mortgaged lands lay, and that the law of Demarara must govern as to the force and effect of the mortgage, and the disposition of the proceeds of the premises, though it was executed in England. The *lex loci rei sitæ* must govern as to realty—its transfer and liens thereon. Comity requires this.

In *Gibson vs. Stevens*, (8 *How.* 397—399,) the Supreme Court of the United States held, that where a firm bought a quantity of pork in Indiana and paid for it, and took guarantee from sellers and memorandum of sale, and the buyers directed the vendors to send it by canal boats to the agents of buyers in Ohio, to be held subject to their order, and the vendees went to New-York, and there got an advance on the pork and assigned same to the person making the advance, and delivered to him all the documents executed by the vendors and warehousemen, and a letter to the Ohio agents directing a delivery, and noti-



lying them of such assignment, and the pork still remaining in Indiana; a few days after the assignment, and before notice of it to the warehousemen or the Ohio agents, a sheriff in Indiana attached the property as belonging to the firm, who so bought it in Indiana; that the last assignee had a valid delivery and transfer, all that the nature of the property and its position admitted of, and that the sheriff had no right to seize the pork under the attachment after the sale and transfer at New-York.

The court said it was analogous to the transfer of a ship or cargo at sea, by delivery of the necessary muniments of title, or endorsement of a bill of lading of the cargo, and these were held sufficient, as all the delivery possible, and that in these cases there was a sufficient symbolic delivery of the property sold. (p. 399.)

## VOLUNTARY TRANSFERS OF MOVABLES.

SEC. 14. If a voluntary transfer of movables in another country or State of our Union, or at sea, is made in a different State or country from the *situs*, and all the possession possible is taken of the property by documents and otherwise, the contract, as a general rule, is valid and the transfer complete, provided the contract is good by the *lex loci contractus*. (8 *How.* 429, 438, 439. 5 *Paige's Ch. R.* 641. 3 *Wend.* 538. 20 *Conn. R.* 400. 10 *Ib.* 444, 446, 447.3 *How.* 512. 3 *Paige*, 373, 376—378. 2 *Wallace's C. C. R.* 132. 7 *Marten's Louis. R.* 707. *Story Confl. L.* § 391.) Notice of such sale to an agent is notice to principal. (3 *Oomst. R.* 156.)

The States of our Union are not foreign States in fact, for they are one in commerce and nationality, but being municipal sovereignties, with independent systems of municipal law, they are in this respect so far different that their separate systems of law and polity make them so far dif-



ferent countries, though the national law is common to all. (2 *Wallace's C. C. R.* 132.)

Hence our States, as well as foreign nations, provide for attachments to secure local creditors. (4 *How.* 467.) Hence executors and administrators and guardians of one State are not allowed to sue or control property in another State under a foreign appointment. Hence a receiver of a failed debtor in one State, assigning to a general assignee is postponed, and his right superseded by a general assignment, under a United States bankrupt law, of property beyond the State, and which the receiver did not get possession of before the assignment in bankruptcy. (17 *How.* 322, 335, 336.)

The Supreme Court of the United States held, that if an assignment be made in a State where it is legal, of property in another State where it is illegal, the same will have no effect on such foreign property. (21 *How.* 126.)

In *Plestow vs. Abraham*, (1 *Paige's Ch. R.* 237, 238,) where a contest was between the assignee of an English bankrupt and English creditors for preference of payment, in the courts of New-York, for the proceeds of movable property in the bankrupt's possession at sea, on his way to America, when he was declared a bankrupt, the Chancellor decided that the English assignee was entitled to the property, and that his right, as to English creditors, was complete, prior to the attachments in the New-York courts; and the Chancellor decreed in favor of the English assignee. Had the creditors been American, their attachments would have had preference.

The above is the true rule of comity, as it administered justice among English subjects, agreeable to English law.

In *Caskie vs. Webster*, (2 *Wallace's C. C. R.* 132,) it was decided by Mr. Justice Grier, that an assignment in one State of a debt due the assignor from a party living in another State, which is effectual to pass the debt by the

law of the place of executing the assignment, the assignor's domicil, is valid in all the States of our Union, and operates to transfer the title to the debt to the assignee so as to prevent an attachment of it in the State of the debtor's domicil. The court well remarked: "Sitting as a court of the United States, we do not think that the different States of this Union are to be regarded, as a general thing, in the relation of States foreign to each other. Especially ought they not to be so regarded in regard to questions relating to the commerce of the country, which is co-extensive with our whole land, and belongs, not to the States, but to the Union."

SEC. 15. The *lex rei sitæ*—the law of the place of the movable—by virtue of sovereignty, may act on the subject and vary the general rule of public law so far as its own tribunals are concerned and are called on to adjudge. (3 *How.* 483. 6 *Hill R.* 626, 627. 20 *Johns.* 255, 267. *Story's Confl. L.* § 423, *f.*)

Though a local law requires stocks or other movables to be transferred on a register to make a legal transfer, yet an assignment before actual transfer on the books would pass an equitable title to such stock, if legal in the place of contract. (*Ib.* and *Story's Confl. L.* §§ 412, 420, 549. *Angell & Ames Corp.* 3d ed. 502, 503, 505, 506.)

In *McLean & Bass, executors, and others vs. Meek*, administrator of Meek, and others, (18 *How.* 16,) the Supreme Court decided, that two administrations of Joseph Meeks, a party dying domiciled in Tennessee, in that State and in Mississippi, were wholly independent, and that a general accounting in chancery in Tennessee, and decree in favor of a creditor for a large sum, and a part payment pursuant to the same of the assets in that State, was not evidence of indebtedness of the estate in the courts of Mississippi, in suit brought there by the creditor to enforce the balance of the decree, and that the original demand alone,

and not the judgment of the Tennessee court, could be sued on in Mississippi, and that the statute of limitations of Mississippi might be pleaded to the original demand.

In *Mackey vs. Cox*, (18 *How.* 104,) the same court held that, though an executor and administrator appointed in one State or country cannot sue in another, in virtue of the original letters of administration, he may receive a debt voluntarily paid in another State.

SEC. 16. A statutory assignment in bankruptcy, or other proceeding, in a foreign country, will not pass title to property in the United States. (5 *Cranch R.* 298; *post*, § 45. 20 *Johns. R.* 254. 5 *Binney*, 353. 6 *Pick.* 286. 11 *How.* 44, 467. *Story's Conf. L.* §§ 411, 421—425. *Cranch R.* 289, 302.) The reason is, that the jurisdiction of every State or nation is confined to the area of its own territory and its ships on the high seas, and property in foreign States or nations are subject to the local sovereignty, and foreign laws have no effect there by their own force, but only by comity, to the extent allowed by local law. (*Ib.*)

#### FOREIGN LIENS.

SEC. 17. The principle of public law applicable to transfers of movable property by the act of the owner, are so in reference to liens on it created by contract. (9 *Paige*, 216. 8 *How.* 429, 438, 439. *Story's Conf. L.* §§ 322 b, 323, 327 a, 401, 403.)

#### WILLS AND SUCCESSION TO MOVABLES.

SEC. 18. Wills and testaments of movables or personal estate, at home and in foreign countries, are governed by the law of the testator's domicil at the time of making his will, not the time of the death of intestate. (*Wheat. Hist. L. N.* 130, 131. 3 *Story's C. C. R.* 765. *Story's Conf. L.* 465, 480. 14 *How.* 400.)

SEC. 19. The interpretation of such wills is according to the *lex domicilii*. (*Ib.* § 479 a. 14 *How.* 400. *Monroe vs. Douglass*, 1 *Selden R.* 451, 452.)

These principles of public law are applicable to the States of our Union. (*Const. U. S.* art. 4, § 2.) In the *Duchess of Orleans* will case her domicil was deemed France, as she lived as an exile in England, and was forced to reside there. (*Lond. Jur.*)

#### INTERPRETATION OF WILLS.

In *Harrison vs. Nixon*, (9 *Pet.* 503, 504,) the Supreme Court of the United States say: "The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicil governs in the distribution thereof, and will govern in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other country in his own view."

In the case of *Monroe vs. Douglass*, (1 *Selden R.* 451, 452,) it was decided by the New-York Court of Appeals, that where a testamentary settlement was made by Sir William Douglass, domiciled in Scotland, of lands there and personalty, the *lex loci* of the realty governs the construction and effect of the document, but that in the courts of New-York the foreign law will be deemed the same as the *lex loci*, unless a party shall aver and prove the foreign law to be different. This rule does not require a presumption of similar statutes, but is confined to principles common

to all systems or cases where the common or civil law prevails in both countries. (23 *Barb.* 513, 514.)

In the case of Kosciusko's will, decided by the Supreme Court of the United States, (14 *How.* 400,) it was held, that though several wills had been made, the latter one, made abroad, revoked the American will, and left the property here undisposed of, and that it belonged to his heirs, on whom the French law, that of his domicil, conferred it; that France was his domicil at his death, and that the French Code sent to the United States government by the French government was legal evidence of that law.

In administering upon a testator's estate, the administration which is granted in the place of the domicil of the testator or intestate, is the principal one, and if property is found in other countries, or in the United States in a different State, administration as to that must be taken out in the latter State, but it will be auxiliary to the first or principal one, and the property in the hands of the auxiliary executor or administrator will be administered upon such principles of law and national comity as the law of his State or nation shall prescribe, subject to all charges or liens enforceable thereon by the *lex loci rei sitæ*. (4 *How.* 467—469. 7 *Paige Ch. R.* 239. 3 *Sandf. Ch. R.* 518.)

#### IMMOVABLES AND REAL ESTATE.

SEC. 20. Immovables and realty are exclusively governed by the law of the place where it is located, and no right therein, or lien thereon, or title thereto, can be acquired except in conformity to it. (*Wheat. Int. L.* P. 2, c. 2, §§ 1, 2, 3. 10 *Wheat.* 202, 469. 9 *Ib.* 565. 6 *Paige Ch. R.* 627. 3 *Pet.* 290. 14 *Ib.* 130. 16 *Ib.* 567. 23 *Barb.* 79. *Story's Confl. L.* §§ 430, 431, 435, 436, 445, 448, 454, 474, 504, 555.)

The local municipal law, therefore, regulates the capacity of a party to take, hold, alien, devise and encumber, and the mode of doing it, and the forms necessary in each case. (*Ib.*)

SEC. 21. In the States of our Union, the municipal laws of each State prescribe the rules and mode of acquiring, encumbering, aliening or transmitting realty and immovables, or any thing savoring of realty. (*Ib.*) And the State laws govern the decisions of the national and federal courts as well as those of the respective States, in all cases arising in them respectively, relating to its realty and municipal law, in common law trials in the federal courts, unless a different rule of decision is prescribed by a treaty or an act of Congress. (1 *U. S. St. L.* 92, § 34. 6 *Wheat.* 119. 12 *Ib.* 153. 5 *Hamilton's Works*, 120, 121.)

SEC. 22. Wills and testaments of realty, and their probate, as well as deeds, mortgages and every other instrument affecting realty, and their verification, no matter where executed, are controlled by the law of its locality.

SEC. 23. Where a testator lives in one country and devises realty in another, in construing the words of the devise, the law of the domicile will be resorted to for its construction, unless it shall appear by its language to be made with reference to the laws, customs and usages of the State or country where the property is situate. (*Story's Confl. L.* § 479 b.)

SEC. 24. In the United States, a treaty may confer on an alien capacity to take, hold, alien or transmit by descent, or devise lands within a State of our Union; and so far it might suspend the action of a State law to the contrary, or by act of Congress aliens may be authorized to take and hold public lands. With these qualifications, the State laws exclusively control as to realty. (*Const. U. S.* arts. 4, 6, § 3.)

SEC. 25. Actions for the recovery of realty or immov-

ables, upon the above principles, belong to the tribunals of the State or nation where they are situated. (16 *Pet.* 493. *Story's Confl. L.* §§ 545, 551, 571.)

SEC. 26. The original title, by virtue of sovereignty, in all lands within the territory of a State or nation, is deemed to have belonged to it; and all rights to such lands must be derived from its laws.

SEC. 27. The right of escheat to lands where there is no legal heir, and to personal property where it is derelict, and no owner can be found, are sovereign powers of every State and nation, and they may take such property as belonging to the public treasury. (*Ante*, § 7.)

SEC. 28. Congress, in the District of Columbia and in the United States territories, has complete sovereignty, and may take possession of lands and derelict property of every sort, in default of a lawful owner or inheritor. (*Ib.*)

#### DROIT D'AUBAINE.

SEC. 29. In feudal times the lord, as a right of sovereignty, seized to his own use the realty and personalty of aliens on their deaths, to the exclusion of the heirs of the deceased. Christianity and civilization have modified this barbarous usage. France and the United States have pursued a liberal policy with reference to aliens. Our treaty with Bavaria, of January 21st, 1845, will show the progress of public law in this matter. The following is an extract from it:

“*Art. I.* Every kind of droit d'aubaine, droit de re-traite and droit de detraction or tax on emigration, is hereby, and shall remain abolished between the two contracting parties, their States, citizens and subjects, respectively.

“*Art. II.* Where, on the death of any person holding



real property within the territories of any party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed the term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction.

"*Art. III.* The citizens and subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation or otherwise; and their heirs, legatees and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in such cases.

"*Art. IV.* In case of the absence of the heirs, the same care shall be taken, provisionally, of such real or personal property as would be taken in a like case of property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same, according to Article II., may take measures to receive or dispose of the inheritance.

"*Art. V.* If any dispute should arise between different claimants to the same inheritance, they shall be decided in the last resort according to the laws, and by the judges of the country where the property is situated.

"*Art. VI.* But this convention shall not derogate in any manner from the force of the laws already published or hereafter to be published, by his Majesty the King of Bavaria, to prevent the emigration of his subjects."

Most of the States of our Union allow aliens, with cer-



tain restrictions, to buy real property, and especially the new States. Our States may exercise the droit d'aubaine as to the property of foreigners, unless the State law shall be in conflict with a treaty or act of Congress. (8 *How.* 490, and ch. 3.)

SEC. 30. After a new State is formed, its laws govern realty the same as in the original States, (3 *How.* 213,) except as to the United States lands. When the conveyance by the United States of their lands in a State is complete, the State laws immediately attach to them and become the controlling law, and regulate all future right to them, or liens thereon, except so far as acts of Congress or compacts with the State have temporarily given a partial exemption to such lands from State legislation, as, for example, exemption from State taxation for a short period.

It was held by the High Court of Chancery of Ireland, in the case of the Duchess of Chandois, a lunatic, that a commission of lunacy found in England, conferred no authority over the lunatic's land in Ireland, but that a new inquisition and finding under that court in Ireland was necessary, to enable a committee to control such land in Ireland. (1 *Sch. & Lef.* 301.)

The same principle is applicable to the States of our Union.

#### FOREIGN GUARDIANS.

SEC. 31. In the United States, guardians appointed by other States or foreign nations, are not allowed any control of the ward's real and personal property situate in any of our States, unless he procures an appointment there agreeable to the *lex loci*. (*Story's Confl. L.* §§ 504, 504 a, 512, 513 b. *Johns. Ch. R.* 353. 1 *Sch. & Lef.* 301. 4 *Cowen R.* 429 n. 4 *How.* 497.)

In travelling through a foreign country, a foreign guar-

dian ought to be recognised as standing in place of a parent; but a guardian seems to have no right to change the domicil of a ward, or permanently remove him from the country or State appointing the guardian.

## FOREIGN EXECUTORS AND ADMINISTRATORS.

SEC. 32. These, like guardians, are local officers, and their right to sue for and control the property of the deceased is confined exclusively to the State, foreign country, District of Columbia, or territory granting letters of administration; and they cannot sue for, in another State or foreign country, or intermeddle with, the deceased's property there without their first taking out new letters, and giving security according to the *lex loci* of the *situs*. (10 *Cushing R.* 173. 4 *How.* 497. 15 *Pet.* 6. 9 *Wheat.* 565. 16 *Pet.* 56, 57. 7 *Johns. Ch. R.* 457. 6 *Ib.* 357. 10 *Paige's Ch. R.* 557. 7 *Cowen R.* 64, 66.)

Where different administrations are granted in different countries, the *lex loci* of the *situs* exclusively governs in every thing pertaining to it, however different the laws may be. (*Ib.* 4 *How.* 498, 499. *Story's Confl. L.* § 524.)

Guardians, executors, administrators, assignees, receivers and local trustees can only be sued and obliged to account in the country or State appointing them, but where a foreign court has jurisdiction of the person by personal service, on such local officers or trustees, and there will be a failure of justice and an irreparable probable loss to some *cestui que trust* or party injured, legatee or party in succession, such court of equity will take jurisdiction and compel an account and payment to the party entitled. (*Story's Confl. L.* § 513. 4 *How.* 467, 497. 15 *Pet.* 6. 9 *Wheat.* 511, 565. 7 *Johns. Ch. R.* 357. 10 *Paige's Ch. R.* 557. 3 *Merrivale's Ch. R.* 29.

7 *Cowen R.* 64. 7 *Cushing's Mass. R.* 523, 524. 2 *Paige's Ch. R.* 402, 404. 6 *Cranch R.* 148. 13 *Pick.* 23.)

These principles are applicable to receivers, treasurers, assignees, committees of lunatics and other local officers appointed by State authority. (17 *How.* 338, and above cases. 5 *Cowen R.* 665, 666. 1 *Sch. & Lef.* 301.)

As a principle of public law, all such trustees, guardians, executors and administrators are local, and they cannot, by comity, exercise any power or authority beyond the territory appointing them, except so far and in the mode the *lex loci* shall provide.

In *Edmonds vs. Crenshaw*, (14 *Pet.* 166,) the Supreme Court of the United States decided, that where there were two executors to a will of a testator dying in one State, and each of them qualified and received funds of testator there, and one of them paid over all the trust funds in his hands to his co-executor, and took his receipt therefor, and removed to another State, that after such removal he continued executor, and might be sued in his new domicil, and compelled to account and pay for all the assets that came to his hands as executor, and that his payment to his co-executor did not protect him from accounting and paying.

An executor in New-York, authorized by a will duly executed to pass real estate in Illinois, conferring the power on the executor to sell all the lands of the testator, and who had duly proved the will before the Surrogate of New-York, the domicil of the testator, was held, by the New-York Court of Appeals, to have authority to sell and convey the lands in Illinois. The court held, that the courts of New-York had power to compel specific performance of an agreement by a citizen of New-York to convey such Illinois lands. (3 *Kernan's R.* 587, 592, 593.) But such contract and its execution must be decreed according to the law of the *situs* of the realty.

## EQUITABLE RULE AS TO ANCILIARY ADMINISTRATIONS.

In *Harvey vs. Richards*, tried in the Circuit Court of the United States before Judge Story, (1 *Mason's R.* 407—430,) the true rule with regard to anciliary administrations was laid down. In that case one Murray, domiciled in Calcutta, in India, made a will and died, leaving property in Massachusetts, where the defendant had been appointed administrator with the will annexed, and he had received a large amount, the proceeds of the Massachusetts property. It did not appear that justice required any transfer of the funds to the executor who had charge of the principal administration in India, the testator's domicil. The plaintiff in Rhode Island, in the United States, claimed the share of the estate that belonged to him by the law of the testator's domicil, Calcutta. Judge Story decided that the property in Massachusetts should be administered and distributed to any legatee or next of kin entitled to it in the United States, pursuant to the principles of the law of the testator's domicil at his death, without remitting it to Calcutta to the executor to be there administered. The court held, that a court of equity had a discretion to administer and distribute the property within its jurisdiction to parties claiming it there, if no injustice would arise from it, and that those who opposed a decree of distribution were bound to show the court that equity forbade it, or it would be granted.

This decision of the able and learned judge commends itself to every mind, and is the true rule between nation and nation as well as the States of our Union.

As sovereignty attaches to all property within the territory of a State, so that the State owns all personal property there not legally owned by others, it is obviously just that a State, by its tribunals of justice, should judge

of the rights of creditors and of parties claiming to succeed to such property, and see that the claimants received their share of it, if they appeared and demanded their rights.

Chancellor Kent expressed his strong approbation of the principles above adjudged. (2 *Kent's Com.* 6th ed. 432, 433.)

#### INTERNATIONAL PROOFS.

In relation to contracts, wills and testaments affecting immovables, the law of the *situs* governs exclusively as to the evidence of them. (*Story's Confl. L.* § 630 b. 9 *Wheat.* 565. 10 *Ib.* 292, 469.)

If these or any of them relate to movables, the law of the testator's domicil at his death, in case of wills, and of the place of contract, in case of agreements abroad, controls, and the proofs of such transactions will be regulated thereby in all suits and proceedings in foreign courts. (*Story's Confl. L.* §§ 260, 260 a, 473, 630 b, 630, 631. 6 *How.* 550. 11 *Louisiana R.* 14.)

#### PROBATE OF FOREIGN WILLS.

The code of Louisiana provides that wills executed in other States of our Union and in foreign nations may be admitted in that State to probate "without any other form than that of registering the testament, if it be established that the testament has been duly proved before a competent judge of the place where it was received." "In the contrary case, the testament cannot be carried into effect without its being first proved before the judge by whom the execution is ordered." (20 *Marten's Louis. R.* 586.) This was a case of a will made in Ireland, and admitted to probate in the State of Alabama. The Supreme Court

held, that as it had been admitted to probate by a court of competent jurisdiction, that it was entitled to be registered as duly proved.

In *Langdon vs. Goddard*, (2 *Story's C. C. R.* 276,) it was decided by Judge Story, that in respect to wills and codicils, that their probate belonged exclusively to the State courts.

In *Tompkins vs. Tompkins*, the learned judge held, that it depends on the law of the domicil to determine the mode of probate and its effect there, both as to real and personal property; that in England the ecclesiastical courts have no jurisdiction, except over wills of personal property, and that as to realty the common law courts have exclusive jurisdiction. (1 *Ib.* 552.) That the decision of any foreign tribunal or State court, having jurisdiction of the probate of a will, is conclusive in all other courts. (*Ib.* 552—554, 559, and cases there cited.) Such decree, of course, would not, as we have shown, affect lands lying in other States or nations, unless the *lex loci* shall so provide.

In *Holcomb vs. Phelps*, (16 *Conn. R.* 127, 131—133,) the Supreme Court of Connecticut, in the case of Adams, a native of that State, but whose place of business was at New-York, at his death, intestate, though he died in New-Jersey, decided to the same effect.

In this case, the Surrogate of New-York had granted administration, and so decided, on the ground that the domicil of Adams at his death was in New-York. Another administration was afterwards taken out in Connecticut, and the point in contest was, whether the question of domicil might be considered as open, the jury having found the domicil to be in Connecticut. The decision of the Surrogate of New-York was held to be conclusive and final, and that the suit by the Connecticut administrator against the New-York administrator could not be sustained

on that ground; and for the further reason that suits against administrators must be brought in the courts of the State appointing them.

#### PROBATE OF WILLS OF REALTY.

Probate of wills of realty must, of course, be made according to the *lex loci rei sitæ*; and when they are so proved, they ought to be regarded as duly authenticated in all other States of our Union, and in foreign nations, where any right under them is sought to be established.

#### RULES OF EVIDENCE.

As the rules of evidence and the admission of testimony are part of the *lex fori*, and not part of the right and title of parties attaching to their contracts or wills, the law of the country where the court sits regulates in these matters. (*Story's Confl. L.* § 634 a.)

In transitory actions, *ex contractu* and *ex delicto*, the law of the country or *lex fori*, and that of the country where the transaction occurred, will be deemed to be the same, and will govern the case, unless a different foreign law be alleged and proved by one of the parties that, by national comity, ought to control.

#### FOREIGN LAWS.

SEC. 33. Foreign laws are to be proved as facts to the court, in order that the court may give to the jury the law of the case. (*Ib.* § 638.)

The proof must be the best testimony that the nature of the case admits of; inferior evidence is not to be given where higher is attainable. (*Ib.* §§ 639, 640. 2

*Cranch R.* 237. 1 *Ib.* 1. 7 *Ib.* 539. 14 *How.* 428, 430. 18 *Conn. R.* 370. 4 *Cowen's R.* 525, n. 6.)

Authenticated copies of written or printed foreign laws should be produced, duly authenticated or exemplified under the great seal of a State, or by a sworn copy, attested by a witness who has compared it with the original, or by the certificate of an officer duly empowered by law to give a copy, and such certificate must be duly proved and authenticated. (*Ib.* 2 *Wend. R.* 411. 6 *Ib.* 475. 1 *Pet. U. S. R.* 352. 4 *Cowen's R.* 526.)

Foreign unwritten laws may be proved by the parol evidence of witnesses having a competent knowledge of them. (*Story's Confl. L.* § 642. 4 *Cowen's R.* 526.) The above principles were held in the Kosciusko will case.

## FOREIGN SEALS.

The public seal of a foreign president or sovereign, or State of our Union, affixed to a paper purporting to be a law, edict or judgment, proves itself, and courts will judicially notice it. (6 *Wend.* 475. 2 *Conn. R.* 85. *Story's Confl. L.* §§ 638, 641, 643.) But it must be a seal upon wax, wafer or an adhesive substance. (1 *Denio's R.* 376.)

But the seal of a foreign court does not prove itself, and must be proved by competent testimony, unless it be a seal of a foreign admiralty court, which proves itself. As admiralty courts are recognised by the law of nations, they are judicially noticed. (*Ib.*) The mode of proving a foreign judgment is to prove the seal, if the court have one, certifying the judgment, and the handwriting of the judge signing the exemplification. (4 *Cowen's R.* 526.)



## AUTHENTICATION OF PUBLIC ACTS, RECORDS AND JUDICIAL PROCEEDINGS OF THE STATES OF OUR UNION.

SEC. 34. For the purpose of evidence in any State our acts of Congress, pursuant to art. 4, sec. 1 of our Constitution, declaring that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, have enacted a law of evidence and authentication relating to laws, records and proceedings in territories of the Union as well as in the States. They enact that records and proceedings of courts shall be evidence in any court of the Union, State, territorial or national, if attested by the clerk, with "the seal of the clerk annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the attestation is in due form." "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." (1 *U. S. St. L.* 122.) The act of Congress of 27th of May, 1804, (2 *Ib.* 298,) enacts, that "all records and exemplifications of office books, which are or may be kept in any public office of any State, not appertaining to any court, shall be proved or admitted in any other court or office in any other State, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the Secretary of State, the chancellor, or the keeper of the great seal of the State, that the said attestation is in due form and by the proper

officer; and that the certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if the said certificate be given by the governor, the Secretary of State, the chancellor or keeper of the great seal, it shall be under the great seal of the State in which the said certificate is made." And the act declares such records entitled to "such faith and credit, in every court and office within the United States, as they have by law or usage in the courts or offices of the States from whence the same are or shall be taken."

The last section of the last mentioned act extends and applies the provisions of both acts to the "territories of the United States, and countries subject to the jurisdiction of the United States."

The Supreme Court of the United States, in *United States vs. Amedy*, (11 *Wheat.* 407,) decided that the seal of a State proves an exemplification of a State law.

In *Owings vs. Hull*, (9 *Pet.* 625,) that court decided that the national courts are bound to take judicial notice of the laws of States. The court said, that the jurisprudence of the States "is in no just sense a foreign jurisprudence, to be proved in the courts of the United States by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts."

In *Leland vs. Wilkinson*, (6 *Pet.* 322,) that court held, that the public laws of a State are judicially noticed by our national courts, but not private laws and special legislative proceedings, and that these are to be proved as facts in the ordinary manner.

As between the States of our Union the same rules are

applicable, and the printed statutes and reports of judicial decisions of each State, published by authority, ought to be received in every other State as evidence of the State laws respectively. (*Const. U. S.* art. 4, § 1. 3 *Phil Ev. Cowen & Hill's Notes*, p. 1137, n. 776.) Such evidence ought, by inter-state comity, to be admitted in all State courts. This principle was adopted in the State of New-York by the act of the 12th of April, 1848, relative to the proof of the State and common law of other States and territories. (See, also, 18 *Conn. R.* 370.)

Acts of Congress, and public, national and State acts, are judicially noticed by all national and State courts. (*Ib.* 2 *Pet. U. S. R.* 307. 4 *Wheat.* 63. 7 *How. R.* 1.)

SEC. 35. Depositions to be used in the circuit and district courts of the United States may be taken as provided by act of Congress. (1 *U. S. St. L.* 88, 89 n. 4 *Ib.* 197 n. 2 *Ib.* p. 166, § 25. 3 *Ib.* 350. 2 *Ib.* 683, § 3. 1 *Pet. U. S. R.* 356, 357. 5 *Wheat.* 424.)

SEC. 36. If the laws of a State are in question in another State, and there is no proof of them on a particular point, the court will presume that the *lex fori* and the law of the foreign State to be the same. (4 *Cowen's R.* 526.)

#### PROOF OF FOREIGN JUDGMENTS.

The general rule is, that the handwriting of the foreign judge, and the authenticity of the seal to the exemplification, should be proved. (4 *Cowen's R.* 426, n. 8.) The foreign court must append a seal to its certificate, if it have one.

## EXTRA-TERRITORIAL JUDICIAL ACTION ON REALTY.

Among the States of our Union, in cases of fraud or trust, where the defendant is personally served with a process within a State, its courts may, by acting on his person, compel the transfer of realty lying in other States as equity may require. (3 *Sandf. Ch. R.* 188. 2 *Paige's Ch. R.* 615. *Wythe's Orig. R.* 135. 6 *Cranch R.* 158. *Post*, §§ 45, 47.)

SEC. 37. The municipal law of a nation may be extended beyond its maritime curtilage for the purpose of preventing frauds on its revenue. The British hovering act, (9 *Geo. II. ch. 35*,) assumes four leagues from the coast as a limit of revenue jurisdiction. (*Wheat. Int. L. P.* 2, c. 4, § 7. 1 *U. S. St. L.* 647, 648, §§ 26, 27. 2 *Ib.* 290, 339, 340. *Wheat. Hist. L. N.* 712. 6 *Cranch U. S. R.* 281—287. 2 *Ib.* 187.) Our act of Congress assumes four leagues as its jurisdictional limit for revenue purposes. The Nootka Convention, between Great Britain and Spain, stipulated that British subjects should not fish or navigate within ten marine leagues of the coasts of the Pacific actually occupied by Spain. (*Wheat. Hist. L. N.* 212.) This revenue jurisdiction beyond a nation's curtilage is confined to vessels bound to the ports of a nation, or seeking to open an illicit trade with its coasts.

Our States may act on and punish crimes committed within them by agencies employed by criminals in other States. (1 *Comstock's R.* 173.)

SEC. 38. The extra-territorial jurisdiction, civil and criminal, extends to all persons on board the ships of a nation on the high seas or in foreign ports. (*Wheat. Hist. L. N.* 225, 739, 745. 2 *U. S. St. L.* 339, 340. 1 *Ib.* pp. 113—115. 4 *Ib.* pp. 115—117. 5 *Ib.* 726. 12 *Peters' U. S. R.* 77—

79. 5 *Wheat. U. S. R.* 76, 200. 2 *Sumner's R.* 482. *Bee's R.* 266.)

But a nation's jurisdiction over its vessels in foreign ports is by presumed permission and comity, and not in exclusion of the local sovereignty and right to punish persons for crimes committed or wrongs done on board within the foreign territory. (6 *Webster W.* 610, 611.)

It may, by law, be extended over a nation's ships, crews and passengers on the high seas, or in foreign ports and places, but an offence once tried in a foreign court, for a violation of a foreign municipal law, cannot, on general principles, be tried in the country where the ship belongs. (*Ante*, § 6. 4 *U. S. St. L.* 115.)

In our republic, a crime may be committed that might be tried either by the State where it is done or by the federal courts. (5 *Wheat. U. S. R.* 184. 12 *Peters' U. S. R.* 77—79.) The case being once tried in any tribunal having jurisdiction, cannot be re-tried in any other court.

All nations may, by law, punish its citizens for acts done without its jurisdiction, and even in foreign countries; as treason, offences against the navigation laws of a State, offences against laws for enforcing neutrality, &c. (5 *Wheat.* 197. *Wheat. Int. L. P.* 2, c. 2, § 15. 2 *Cranch U. S. R.* 102. 1 *U. S. St. L.* 112, 113. 4 *Ib.* 115.)

#### PIRACY.

SEC. 39. Piracy, says Wheaton, is defined by the text writers to be the offence of depredating on the high seas, without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other. (*Wheat. Int. L. P.* 2, c. 2, § 15.) And all nations may take cognizance of piracy on the high seas and coasts,

and punish it. (*Ib.* 12 *Pet.* 72—78. 5 *Wheat.* 176, 184, 412. 4 *U. S. St. L.* 115, 116. 1 *Ib.* 113—115. 3 *Ib.* 513. 11 *Wheat.* 1. 3 *Ib.* 610.)

A public armed vessel, having a lawful commission against an enemy's nation, may commit depredations on neutrals. Such wrongful acts are not piracy, but they are hostile deeds of the nation to which the ship belongs, and for such offences the nation granting the commission alone can try and punish the officers and crew. (*Ib.*)

It is piratical to depredate under commissions from different sovereigns at war. (*Ib.*)

It is manifest that, as criminal intent is essential to crime, no persons can be pirates unless robbing vessels on the high seas, or on them and along the coasts of maritime nations, is the object of their cruise. For pirates are "enemies," according to Wheaton, "of all mankind," and all nations have a right, by their armed vessels, to capture them, and, by their courts, try, condemn and execute them. (*Ib.* 177.) If a set of men charter a vessel, and sail to another country for the purpose of aiding the people of the latter to change their government, the offence is not piracy according to the law of nations. It would constitute simply the offence of treason, if these maritime adventurers were to enter the maritime curtilage of such foreign country, or land on its coasts, and there commit acts amounting to treason by the *lex loci*; and upon fair open trial and conviction for acts of force actually committed within the curtilage or territory of the invaded nation, they might be punished agreeable to that law. (*Wheat. Int. L.* P. 4, c. 3, § 17.) But if such vessel were to attack an armed ship of the invaded nation on the high seas, with a view to capture her and reach the coasts to join the native revolutionists, it would not be piracy. As the law of every nation, except as to its own citizens on the high seas, it has no jurisdiction there; it cannot make

such an act by foreigners piracy, or any other crime ; it would be simply an informal act of war. (*Wheat. Int. L. P. 4, c. 3, §§ 9—18. Webster's Dipl. & Of. Pap. 85, 96, 97, 106.*) Self-defence may be, of course, resorted to by the nation attacked. (*Ib.*)

The laws of the nation from whose coasts or ports such informal military party proceeds, may make the fitting out of such warlike expedition there a crime, and punish it as a violation of the *lex loci*, for acts done within its territory or curtilage. And so far as its own citizens are concerned in such irregular war, the *lex loci* of the country of departure may make it a crime and punish it. On this principle our neutrality acts of Congress are based. (*Wheat. Int. L. Ib.*)

In the United States the crime is a misdemeanor, punishable by fine and imprisonment. (*Wheat. Int. L. Ib. and P. 2, c. 2, §§ 10, 13, 15.*) The Americans engaged in such expeditions are still American citizens until they become citizens of some other country ; and the President has no power to proclaim them pirates or outlaws, and divest them of their American character.

Nations may, by treaty, confer on each other the right of trying and punishing the citizens and subjects of each for piracy, for defined wrongful acts on the high seas, to the injury of the contracting parties. This creates a special law of nations, by consent, as to the condemned offence, confined to the contracting States, and not authorizing the extension of the treaty law to other nations not party to it. Our treaty with Spain, by article 14th, (8 *U. S. St. L. 144,*) declares, that “No subject of his Catholic Majesty shall apply for, or take any commission or letters of marque, for arming any ship or ships to act as privateers against the said United States, or against the citizens, people or inhabitants of the said United States, or against the property of any of the inhabitants of any

of them, from any prince or State with which the said United States shall be at war."

Pursuant to the treaty with Spain, and to execute it and other like treaties, Congress passed an act, (*Acts of Cong.* 1847, p. 95,) by which it was enacted, that "Any subject or citizen of any foreign State, who shall be found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such persons are citizens or subjects, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted and punished before any Circuit Court of the United States for the district into which such person may be brought or shall be found, in the same manner as other persons charged with piracy may be arraigned, tried, convicted and punished in said courts." (*Wheat. Hist. L. N.* 176, 183—187.)

A nation may define and punish as for piracy its own citizens, as persons on board American vessels guilty of slave-trading on the high seas or the coast of Africa, as Congress has done; but this is only municipal piracy, and not such by the general law of nations, and our acts of Congress can only be enforced by our national courts. No foreign nation has a right, unless a treaty consent is given by our republic, to capture such vessels or to punish such offenders against our criminal laws in their courts. (*Wheat. Hist. L. N.* 176, 177, 183, 186, 187. 2 *U. S. St. L.* 70, 71. 3 *Ib.* 600, 601. 1 *Ib.* 347 n. a. 2 *Ib.* 246. 3 *Ib.* 450, 600. The case of the ship *Louis*, *Dodson's Adm. R.* v. 1, p. 95.)

The reason is, that a nation's jurisdiction is confined to its territory, to its own ships and to its subjects and citizens, except where by treaty consent a nation's power is ex-



tended to the citizens of the other contracting party. (*Ib.* 10 *Wheat.* 66, *The Antelope.* *Wheat. Hist. L. N.* 186, 187.)

Acts of parliament of Great Britain make the slave trade piracy. It is, however, municipal piracy, and each nation takes exclusive cognizance of such acts by its own citizens, and punishes them, unless a treaty shall otherwise provide. (*Wheat. Int. L. P.* 2, c. 2, § 13. 10 *Wheat.* 66.)

#### EXTRA-TERRITORIAL COURTS.

SEC. 40. A nation, by treaty, may acquire the right to establish special courts or consular tribunals within the territory of a foreign nation. The extent of such power, and its exercise, depends on the treaty, or on a law of the nation where they are located. China and the Ottoman empire have conferred such judicial privileges, by treaties, upon our republic.

The 4th article of our treaty with the Ottoman Porte of 1830, stipulates that American citizens committing offences "shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks." (8 *U. S. St. L.* 409.)

Our treaty of 1844 with China provides, by the 21st article, that "citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul or other functionary of the United States thereto authorized, according to the laws of the United States." By article 25th, it is stipulated that all questions of personal or property right "arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government. And all controver-

sies occurring in China between citizens of the United States and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments respectively, without interference on the part of China." By article 26th, it is agreed, "that merchant vessels of the United States lying in the waters of the free ports of China open to foreign commerce, will be under the jurisdiction of the officers of their own government, who, with the masters and owners thereof, will manage the same without control on the part of China." By the 29th article it is stipulated, that all American merchants, seamen and citizens, shall be under the superintendence of their own officers. (8 *U. S. St. L.* 596—598.) The 16th article (*Ib.* 595) subjects American citizens, for debts due to a Chinaman, to suit before the American consul.

The duties of the consuls, and the power of these special tribunals, are explained in Chapter VIII., and by the acts of Congress for carrying the treaties into effect.

## FUGITIVE CRIMINALS AND SLAVES.

SEC. 41. A foreign State is not bound to deliver up foreign fugitive criminals, offenders, citizens, slaves or apprentices, unless bound by treaty or compact to do so; and then the treaty or compact defines the extent of the obligation and the mode of its exercise. (*Story's Conf. L.* § 96, n. 2, 3; §§ 621, 628, n. 1—6. *Wheat. Hist. L.* N. 729, 736. 14 *Pet.* 583, 598, n. 569, 570. Metzger's case, 5 *How.* 188. 16 *Pet.* 611. 15 *Ib.* 518.)

In the United States the power, it would seem, of delivering foreign criminals or fugitives for extradition, can be exercised only in the cases provided for by acts of Congress, the treaties of the Union, and by the President, in pursuance of the same. (*Ib.* 14 *How.* 103.)

No State or officers of a State have any such power, as our foreign relations are under the exclusive control of the national government. (*Ib.*)

Our treaty of 1842 with Great Britain provides, that each contracting party "shall, upon mutual requisitions by them or their ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder or assault, with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or be found within the territories of the other; provided, that this shall be only done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made upon oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive." The expenses are payable by the nation making the requisition. (8 *U. S. St. L.* 576, art. 10 of treaty.)

By our treaty with France of 1843, a like treaty bound each nation to deliver up fugitives from justice from each, on like evidence and in like manner, in cases of persons charged with the crimes of "murder, (comprehending the crimes designated in the French penal code by the terms

assassination, parricide, infanticide and poisoning,) or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment." (8 *U. S. St. L.* 582, art. 2 of treaty.) The French government agreed to surrender "only by authority of the Keeper of the Seals, Minister of Justice," and the United States "only by authority of the executive thereof" (Art. 3.) Each nation pays all expenses of its requisitions. (Art. 4.)

Article 5 limits the treaty to crimes committed after the date of the treaty, and excludes its application "to any crime or offence of a purely political character."

By an additional article added in 1845, the crime of robbery is defined "to be the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear; and the crime of burglary, defining the same to be breaking and entering by night into a mansion house of another, with intent to commit felony; and the corresponding crimes, included under the French law in the words '*vol qualifié crime*,' are all declared to be within the treaty, and that such fugitive criminals shall be mutually delivered up." (8 *Ib.* 617.)

By our treaty of December 20th, 1849, between our republic and the Sandwich Islands, extradition of criminals is stipulated.

In the United States it is held, that the courts and judicial officers, in aid of the President, must examine and adjudge, upon legal evidence, the treaty guilt of the foreign criminal, before the President can deliver him upon a requisition, made in pursuance of our treaties by foreign nations. (Kaine's case, 14 *How.* 103. Metzger's case, 5 *Ib.* 176, 188.)

Among the States of our Union the above doctrines of

the law of nations apply to them, except so far as it is changed by the State compact contained in the Constitution of the Union. The 2d section of art. 4 provides, that "a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

By our acts of Congress, (1 *U. S. St. L.* 322; 2 *Ib.* 116, § 6; *Acts of Cong.* 1850, p. 462,) upon a demand by the executive of a State where a crime was committed, and from which the criminal fled, accompanied with a copy of the indictment found against him, or with an affidavit charging any crime specified in the Constitution above quoted, it is made the duty of the executive of the State where the criminal is found to cause the fugitive criminal to be arrested, and to be delivered to the agent of the State making the requisition, to transport him there for trial. And the chief justice of the district is authorized to arrest and deliver up such fugitive criminals. (2 *Ib.* § 6, p. 116.)

The crimes within the compact are those which were, at the date of the Constitution, the 17th day of September, 1787, such as the words fairly include. Any acts then declared by the law of any State treason or felony, or a crime by the common law, would be within the stipulation. The words "other crimes," seem to mean any thing which, at the date of the Constitution, was a crime at common law or by statute.

The obligation of a State to deliver up fugitives is limited to the constitutional provision. (16 *Pet.* 611. 15 *Ib.* 518, 592. *Story's Confl. L.* §§ 93, 96. 4 *Wash. C. C. R.* 396.)

In the case of slaves or persons bound to service

fleeing from one State to another, the 2d section confers the right of recapture on the owner of such fugitive to arrest him anywhere in the Union, and no State law can impede or regulate such right. (*Const. U. S.* art. 4, § 2. 1 *U. S. St. L.* 302. 2 *Ib.* 116, § 6. 16 *Pet.* 539.)

The fugitive must actually flee, and not be brought by his master or be voluntarily permitted to go into another State, for, in the latter cases, the Constitution does not apply, and a State may either deliver up such slave or protect him as a freeman.

No State can claim the delivery of a citizen of another State on the ground of an imputed crime against its laws committed out of its territory, as that does not present the case of a fugitive criminal. All penal and criminal laws are local, and foreign States are not bound, by comity, to enforce them. But a State may, if it arrest a criminal within its territory, punish him for crimes against such State, though he was in another State when he caused or effected such crimes. (1 *Const. R.* 173.)

Though the States of our Union may not be obliged to deliver up to each other criminals, or debtors or persons bailed, fleeing from one into another, except in the cases specified in the Constitution, a State may, by virtue of its general police powers, pass laws to deliver up or to arrest and try foreign offenders and fugitive criminals from other States, or deliver up persons bailed. (14 *Pet.* 568, 569.)

Chief Justice Taney, in *Holmes vs. Jennison*, (14 *Ib.* 568, 669,) speaking of the power of the States over foreign criminals, says: "Undoubtedly, they may remove from among them any person guilty of or charged with crimes, and may arrest and imprison them in order to effect this object. This is part of the ordinary police powers of the States, which is necessary to their very existence, and which they have never surrendered to the

general government. They may, if they think proper, in order to deter offenders in other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. In all of these cases, the State acts with a view to its own safety, and is in no degree connected with the foreign government in which the crime was committed. The State does not co-operate with a foreign government, nor hold any intercourse with it, when she is merely executing her police regulations."

As the doctrines of national comity apply as between our States, our constitutional compact, in reference to fugitives from other States, ought to be sacredly regarded and enforced, with a view to the due administration of justice, and the preservation of the harmony of the Union. But as the laws of each State are confined to its territory, no State can complain of not being permitted to extend its policy, its laws or its local institutions, into other States or to places beyond its borders.

In the case of *Prigg vs. Pennsylvania*, (16 *Pet.* 611, 613, 622,) the Supreme Court of the United States decided that slavery is a local institution, and confined to the territory which by law creates the institution; and that no other nation or State is bound to regard it or respect any rights founded on that law, but that when recognised it is from comity.

In the United States, by the stipulation of the Constitution, say the Supreme Court, "the power of legislation upon this subject (slavery) is exclusive in the national government, or concurrent in the States, until it is exercised by Congress. In our opinion it is exclusive." (p. 622. See, also, Judge Wayne's Op. 638.)

The court also decided, that by our Constitution, the owner of a slave is clothed with entire authority, in every State of the Union, to seize and recapture his slave when-



ever he can do it without any breach of the peace, or any illegal violence. In this sense, and to this extent, this clause of the Constitution may properly be said to execute itself, and to require no aid from legislation, State or national. (p. 613.)

From the nature of the case, this power of legislation to enforce this right of recapture of fugitive slaves, as well as that of fugitive criminals, must be exclusively in Congress, as the court have properly held.

The extradition of foreign fugitive criminals, or of criminals fleeing from one State to another of our Union, seems of necessity exclusively to belong to the national government, and the case of fugitive slaves, for the same reason, belongs to Congress. (14 *Pet.* 540. 1 *U. S. St. L.* 302 2 *Ib.* 116.)

This provision is a *quasi* treaty stipulation among the States, and the power of enforcing it and giving it full effect is now settled to be in Congress, although it is not found among the express powers given by the Constitution. (1 *U. S. St. L.* 302, n. b. 2 *Ib.* 116, § 6. 5 *How.* 215.)

By the national Supreme Court, in *Ells, apt. vs. Illinois*, it was decided that States may pass laws to compel their respective people to respect the right of owners of slaves. (ch. 7, § 29.)

National and our private international comity require, as well as the Constitution of the Union, that our treaties and constitutional compact for delivery of fugitive criminals and slaves should be executed in good faith, and no State law ought to be passed to prevent State officers from aiding in giving them full effect.

The article for the extradition of fugitive criminals and slaves is confined to those escaping from one State to another; yet, Congress, in the true spirit of national comity, has by law provided for the extradition of fugi-



tive slaves and criminals escaping from States into the District of Columbia and the territories of the Union. (1 *U. S. St. L.* 302. 2 *Ib.* 116, § 6.)

An act of Congress, in the same spirit of comity, enacts that where cessions have been or shall be made by any State, of the jurisdiction of places where light-houses, beacons, buoys or public piers have been erected and fixed, or may by law be provided to be erected or fixed, with reservations that process, civil and criminal, of any State, may be served there, shall be valid cessions. And that, where any State has or shall make a cession of jurisdiction, for the purposes aforesaid, without reservation, all process, civil and criminal, issuing under the authority of such State, or the United States, may be served and executed within the places, the jurisdiction of which has been so ceded, as if no such cession had been made. (1 *U. S. St. L.* p. 426.) Cessions by States generally make reservations for the purpose of serving all civil and criminal process of the State in the ceded places, but in no case do the national authorities suffer the exclusive jurisdiction of the nation over forts, &c., to make them an asylum of fugitive criminals from any State. This is true national comity.

In cases within the Constitution, the acts of Congress regulate extradition. In cases without that instrument, of failed debtors or others, State comity cannot be legally applied to the delivery of other fugitive criminals, or of bailed debtors or others fleeing from other States, except in pursuance of a law of the State of asylum. If, therefore, new crimes have arisen since the Constitution, and not embraced in it, which are deemed *malum* in all the States, laws for extradition of these fugitive criminals might be passed in the States of the Union.

National comity and the spirit of our private interna-

tional law, require that all parts of our system should act in harmony with a view to good government.

In the case of the British prisoners, Sheazlé and others, charged with piracy created by acts of parliament, and not under the laws of nations, on *habeas corpus*, the Circuit Court of the United States for Massachusetts decided that the case was within our treaty of extradition with Great Britain; that it seemed fit that extradition of foreign criminals should be enforced, though it is usually considered that there is no political obligation under the laws of nations to do it. (*Holmes vs. Jenison*, 14 *Pet.* 540, 549. *United States vs. Davis*, 2 *Sumner's R.* 482, 486.) It is optional to do it or not, though in case of mere political offences it is seldom done. (1 *Wood. & Minot's C. C. R.* 68—70.)

The court also held, that State magistrates and officers may execute, pursuant to an act of Congress, an arrest, or any duty relative to penalties or to small offences against the revenue laws of the Union, if they please, and their acts are valid. (*Ib.* pp. 70, 71. 16 *Pet.* 539, 631.)

In Kaine's case, before Justice Nelson, it was held by him that a requisition for the arrest of a foreign fugitive criminal must be made upon the national executive, and that it could not be made in any other way; that it is a demand of a nation upon a nation, and not a case of judicial cognizance; that the executive alone possesses no authority under the Constitution and laws to deliver up to a foreign power any person found within the States of this Union, without the intervention of the judiciary.

It has also been argued that great inconvenience may exist in the pursuit and apprehension of fugitives upon the construction contended for, in consequence of the extended frontier line between the two countries, as much time will be consumed in making the requisition upon the President.

This may be so, but I cannot agree that a sound construction of the treaty, and one which affords nothing more than a just protection to the personal liberty of the citizen against the abuse of power, shall be made to yield to the suggestions of convenience. For, although the prisoner before us may be a foreigner, and even may be a fit subject to be given up to the subordinate and irresponsible agents of the government claiming him, still it is not to be denied that the same power thus attempted to be exercised by them in this instance, is equally applicable to any citizen of the country, upon a like complaint; and besides, under our system of laws and principles of government, so far as respects personal security and personal freedom, I know of no distinction between the citizen and the alien who has sought an asylum under them. I will simply add that, according to the act of 6 and 7 Victoria, already referred to, carrying into effect this treaty, the indulgence of any such convenience in its execution is regarded as too dangerous to the subjects of that government residing within its dominions, on the other side of this learned boundary.

The treaty, after providing for the requisition of the one government upon the other for the surrender to them, provides, that the respective judges, and other magistrates of the two governments, shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive.

After the requisition has been made upon the President, the organ of the government as regards our foreign relations, and his authority obtained, the means are thus provided for procuring the surrender. An application is then made to the judiciary of the country, not upon the requisition of the foreign government, but, as in all other cases, upon the authority of its own—and the warrant issued in

pursuance of such application, runs in the name of the President of the United States.

\* \* \* \* \*

The treaty provides that the arrest of the alleged fugitive and commitment for the purpose of a surrender, shall be made "upon such evidence of criminalty as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed."

The act of Congress makes no provision on this subject, except as it respects the admissibility of a species of evidence which will be noticed hereafter. The laws of New-York, therefore, are to govern and regulate the judge or commissioner in hearing and determining the criminality of the prisoner; as he was *found in that jurisdiction*. This would be so, even without the specific provision of the treaty, as the only mode of proceeding in summary criminal proceedings, before the Federal magistrates, is according to the practice before the State magistrates in analogous cases. The 33d section of the judiciary act of 1789 expressly provides that summary proceedings against persons for crimes committed against the United States, shall be agreeably to the usual mode of process against offenders in the State in which he may be found. I am not aware of any other act of Congress on the subject.

This accords with the construction given to the treaty in the Act of Parliament, 6 and 7 Victoria, which requires the production of such evidence as, according to the laws of that part of Her Majesty's dominions where the prisoner is found, would justify his apprehension and committal for trial, if the crime had been there committed.

According to the laws of New-York, regulating these summary proceedings in criminal cases, evidence is heard, as well on *behalf of the accused*, as *against* him, and *should*

*have been so heard in this case.* (See the decision of Kaine's case, 14 *How.* 103.) Mr. Justice Nelson, on rehearing the case, discharged the fugitive for the reasons above stated.

#### FUGITIVE CRIMINALS.

In the case of Joseph Smith, the Mormon prophet, the Circuit Court of the United States, at a term held in Illinois, decided, on *habeas corpus*, that Smith, who was arrested in Illinois on a requisition of the Governor of Missouri, should be discharged, on the ground that the prisoner was not a fugitive criminal from Missouri. The court held that Smith, being charged with inciting, while in Illinois, another man to attempt a murder in Missouri, was not a fugitive flying from that State to Illinois, and that the Governor of Illinois had no authority to deliver him up for trial in Missouri. (3 *McLean's C. C. R.* 132, 133.)

It seems a duty of every State to pass laws to punish in its own courts, and pursuant to its laws, all crimes that persons within their respective territories may cause to be committed in other States of our Union by any instrumentality used there. As such offenders are not fugitive criminals, they will escape justice unless the *lex loci* shall inflict it.

The conclusion seems to be that extradition of foreign criminals can only be authorized by treaty or act of Congress; and that of domestic fugitive criminals must be authorized by the national Constitution, or by the law of the State where the fugitive is found.

#### DESERTERS.

Extradition of deserters from the military, naval and mercantile service of a foreign country, or of political

offenders or slaves, cannot be demanded of any nation unless stipulated by treaty, or expressly authorized by the laws of the State or nation where such foreigners are found. (*Wheat. Hist. L. N.* 175. 8 *U. S. St. L.* 262. 1 *Ib.* 254. 4 *Ib.* 160, 359, 360. 9 *Ib.* 838, 839, 863, 896, 917, 946, 980. *Webster's Dipl. and Of. Papers*, 89, 90. *President's Mess.* Aug. 11, 1842. 6 *Webster's W.* 405. *Secretary Marcy's Letter to the Austrian Chargé*, Sept., 1853.)

Our existing treaties of extradition with Great Britain and France, as well as the expired Jay's treaty, by their terms, exclude military crimes triable by military or naval court-martial, and are confined to cases of apprehension and commitment for trial, terms applicable only to the ordinary civil courts having criminal jurisdiction.

The case of Nash, *alias* Robbins, who was demanded by the British government on a charge of mutiny and murder on board a British ship-of-war on the high seas, was a crime triable by naval court-martial, and it seems to be a case not within the treaty. (*U. S. State Trials*, 392, 393, 401, 454.) Judge Bee seems not to have fixed his attention on the above construction of the terms of the treaty. As Nash, *alias* Robbins, swore that he was an impressed American seaman, his extradition by President John Adams upon the judge's decision, without any investigation of the fact of his citizenship and impressment, seem to us unadvised official acts. He was surrendered, tried by a court-martial and executed. The conduct of the executive in the matter was arraigned in Congress by the republican party and defended by the federal party, among whom the eminent John Marshall was most prominent. In his argument he put his defence of the surrender on the fact that Nash was a British subject, and had committed a murder on board a British man-of-war, and that murder was within the treaty, and no idea of his trial

by court-martial seems to have been thought of by the judge whose opinion Marshall defended. Marshall, in his speech, admitted that if he (Nash) was an impressed American citizen, his acts of mutiny and murder would have been justifiable. (pp. 454, 455.) Yet this material fact was left untried, until Nash, *alias* Robbins, was tried by naval court-martial for mutiny and murder, and executed. Then the great parties of our country tried this material issue without the dead man's aid.

Our treaties of extradition do not include political offences, such as treason, misprision of treason, libels or desertion, or any offence which is substantially a part of such political or military crime. (*President's Mess.* Aug. 11, 1842. *Webster's Dipl. and Of. Papers*, 228.) The President's message, referring to the extradition clause of our treaty with Great Britain, says: "The article on the subject in the proposed treaty is carefully confined to such offences as all mankind agree to regard as heinous, and destructive of the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offences, or criminal charges, arising from wars or intestine commotions. Treason, misprision of treason, libels, desertion from military service, and other offences of similar character, are excluded." (6 *Webster's W.* 355, 363.)

#### EXTRADITION LAW, PROOFS, &c.

The treaty of our republic with Great Britain, of 1842, (8 *U. S. St. L.* 576,) Article 10th, and our treaties with France, of 1843 and 1845, (*Ib.* 582—617,) regulate extradition.

The 14th Article of our treaty, of 1849, with the Hawaiian Islands, is in these words:

"Article 14.—The contracting parties mutually agree



to surrender, upon official requisition, to the authorities of each, all persons who, being charged with the crimes of murder, piracy, arson, robbery, forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territories of the other, provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial, if the crime had there been committed; and the respective judges and other magistrates of the two governments shall have authority, upon complaint made under oath, to issue a warrant for the apprehension of the person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive." (See *Acts of Cong.* 1850, 1851, p. 180, for treaty.)

In the matter of Sheazle and others, Justice Woodbury gave an elaborate view of the law of extradition. 1 *Wood. & Minot's C. C. R.* 66. See, also, *Ch. tit. Extrad.*)

It seems clear, from the terms of these treaties, that they do not include military or naval crimes triable by court-martial, but only offences specified in the treaties of which the ordinary civil courts have jurisdiction. In the case of the British deserter, Walsh, arrested by Joseph Bridgham, Esq., United States Commissioner at New-York, in 1851, at the instance of the British Minister, the author, as counsel for prisoner, insisted: 1. That all the acts of



Walsh done at the time of desertion from the British army were part of the military crime of desertion, and triable by court-martial, and not by the ordinary courts, and so not within the treaty of 1842. 2. That all acts, except desertion, charged as crimes against British criminal law, were not felonious, as escape was the only object. On the latter point the Commissioner placed his decision, but, as he informed the counsel for Walsh, he was satisfied the other ground was tenable.

BRITISH LAW ENFORCING ART. X. OF THE ASHBURTON TREATY  
WITH THE UNITED STATES IN 1842.

The British Act of Parliament, passed August 22d, 1843, (*Stat. Gr. Britain & Ir.* 1843, p. 503,) provides that upon a requisition made upon her Secretary of State in England, or upon the person administering the government of Ireland, or of any of her colonies or possessions, for an American fugitive criminal in the cases specified in the treaty of extradition, that the said Secretary or officer should issue a warrant, commanding his arrest for delivery by magistrates or other judicial officers, and that "Thereupon it shall be lawful for any justice of the peace, or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as, according to the laws of that part of Her Majesty's dominions, would justify the apprehension and committal for trial of the person so accused, if the crime of which he or she shall be so accused had been there committed, it shall be lawful for such justice of the peace, or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and

also to commit the person so accused to jail, there to remain until delivered pursuant to such requisition as aforesaid."

The act also enacts, "That in every such case copies of the depositions upon which the original warrant was granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

Also it is enacted, that a Secretary of State, or chief secretary in Ireland, or person administering the government in the place of arrest and commitment, upon the certificate of the justice or judicial officer charged with the case, shall deliver such American fugitive criminal to such person as shall be authorized to receive and take him or her, under the authority of the United States, to the territory thereof for trial.

The act allows two months for the removal of the fugitive after arrest, and if not so removed or sufficient cause shown, the criminal will be discharged.

Another act of Parliament, passed August, 1845, enacts, that any police magistrate of the metropolis shall and may, upon receiving a warrant of requisition from a chief Secretary of State, issue a warrant to apprehend an American or French fugitive criminal in any part of England, to any constable; and any constable to whom it shall be directed, or who may be appointed, may execute it anywhere in England. (*Stat. Gt. Britain & Ir.* p. 1051.)

By our extradition treaty between our republic and Prussia, of June 16th, 1852, (see *U. S. St. L. and Treat.* 1853 and 1854, pp. 99—102,) this subject is regulated.

By our extradition treaty stipulations with the Swiss Confederation, of November 25th, 1850, Arts. 13, 14, 15,

16, 17, (9 *U. S. St. L.* 1855, 1856, pp. 7, 8,) mutual delivery of criminals are provided for.

By our treaty with Austria, of July 9, 1856, the extradition of criminals is provided for. (*U. S. St. L.* p. 108, arts. 1, 2, 3.)

#### CERTAIN EXTRA-TERRITORIAL RIGHTS.

By our treaty with Mexico, of December 30th, 1853, the right of American citizens, property, mails and troops *en route* for our Pacific possessions is guaranteed, as well as the right to protect a road and rail-road to be constructed by Americans. (See *U. S. St. L.* for 1853, 1854, pp. 1827—1829, art. 8.)

By our treaty of 1846 with New-Granada, Article 35, rights analogous to the above are secured. (9 *U. S. St. L.* 95, 96.)

By our treaty with Great Britain of 1848, our closed mails, going from one part of the republic to another through British North America, are allowed a passage. (*Ib.* 147.)

By Articles 1 and 2 of our treaty with Great Britain, of June 15, 1846, a common navigation exists along Fuca's and other Straits, between Vancouver's Island and Oregon, and certain rights of navigation of the Columbia River are reserved to British subjects trading with the Hudson's Bay Company. (9 *U. S. St. L.* 869.) But a common right of navigation is guaranteed mutually to the citizens of the contracting nations.

By the 9th article of the treaty between our republic and Borneo, of June, 1850, the United States has jurisdiction to hear and determine actions in which American citizens are concerned. (See *U. S. St. L. and Treat. for* 1853, 1854, p. 90.)

By our treaty with the Free and Hanseatic Republics of Hamburg, Bremen and Lubeck, of April 30th, 1852,

the consuls of the parties are authorized to decide differences between masters and sailors of the respective parties. (*Ib.* p. 95.)

By our consular convention with France of February 23d, 1853, Article 8, similar powers are conferred on French and American consuls over disputes between the masters and sailors of their respective nations. (*Ib.* 118.) By our treaty with Hanover, of June 10, 1846, similar provisions are made. (9 *U. S. St. L.* 60, 61.)

By our treaty with the Two Sicilies similar provisions are made. (*U. S. St. L.* for 1856, 1857, p. 100, art. 19.)

With most of the Christian nations of Europe and America our republic has treaty stipulations for the recapture and delivery up of deserting sailors, and it seems to be a general international duty resting on the comity of nations.

By our consular convention with France, ratified August 11, 1853, and to continue ten years, it is provided :

*Art. 7.* In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory, in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens.

*Art. 8.* The respective consuls-general, vice-consuls or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship, or the list of the crew, and shall be held during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls, made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

*Art. 9.* The respective consuls-general, consuls, vice-consuls or consular agents, may arrest the officers, sailors, and all other persons making part of the crews of ships of war, or merchant vessels of their nation, who may be guilty or accused of having deserted said ships and vessels, for the purpose of sending them on board or back to their country. To that end, the consuls of France in the United States shall apply to the magistrates designated in the act of Congress of May 4, 1826

—that is to say, indiscriminately to any of the federal, State or municipal authorities; and the consuls of the United States in France shall apply to any of the competent authorities and make a request in writing for the deserters, supporting it by an exhibition of the registers of the vessel and list of the crew, or by other official documents, to show that the men whom they claim belonged to said crew. Upon such request alone, thus supported, and without the exaction of any oath from the consuls, the deserters, not being citizens of the country where the demand is made, either at the time of their shipping or of their arrival in the port, shall be given up to them. All aid and protection shall be furnished them for the pursuit, seizure and arrest of the deserters, who shall even be put and kept in the prisons of the country, at the request and at the expense of the consuls, until these agents may find an opportunity of sending them away. If, however, such opportunity should not present itself within the space of three months, counting from the day of the arrest, the deserters shall be set at liberty, and shall not again be arrested for the same cause.

## NATIONAL COMITY.

SEC. 42. This is a principle adopted by Christian nations, acting upon the golden rule, and is a means of promoting commerce and the mutual interest and convenience of nations. By it foreign transactions, marriages, contracts, wills and testaments, divorces, judgments, sentences and decrees have, with certain exceptions, a universal operation given to them in all civilized States. By its benign operation, foreign corporations as well as individuals are permitted to sue in foreign tribunals. (13 *Pet. U. S. R.* 590.) By it, the foreign contracts of corporations created in one State may, if their charters allow them so to

contract, be enforced in foreign or domestic tribunals. (*Ib.*) The Supreme Court of the United States, in the case last cited, decided that all contracts made abroad by corporations, if permitted by their charters, ought to be enforced, unless they were contrary to the known policy of the State, or injurious to its interests. It was held that this principle of national comity applied not only to nations, but to the States of our Union. (5 *How. U. S. R.* 311, ch. 5, § 44.) In the First Judicial District Court of Pennsylvania, on bill in equity, it was decided that though a corporation may, by comity, act and contract by agents in other States than those where it is chartered, its residence is exclusively in the State creating it, and remedies against it or its officers must be there pursued. (*Select Equity Cases by Parsons*, pp. 180, 534.)

The general principles of national comity are substantially those of natural equity. A man who in one country makes a contract as to personal property, wherever situated, which is legal by the *lex loci*, acquires a right according to the contract, which ought to be respected and enforced by the tribunals of every nation. And as a general rule, the *lex loci* being deemed to be had in view by the parties, if no other place of performance is named, that law governs naturally as to the capacity to contract, the mode of contracting and the effect of the contract. If a contract is made in one country to be performed in another, this, by reference to the latter country, shows that the parties contracted in reference to the law of the place of performance. (5 *How. U. S. R.* 310, 315.) And all tribunals ought to enforce such contracts, being legal by the *lex loci contractus*, if not opposed to the law or policy of the State before whose tribunal the suit is brought. Upon this principle a marriage contract, legal as to parties and form of solemnization, is valid in all foreign countries. (6 *How.* 550.) In the State of New-York marriage is a

civil contract, (2 *R. S.* 74, §§ 1, 3,) and may be legally made by an agreement *in presenti* to be man and wife, and by consummation; the parties being of legal age to assent, as fixed by the *lex loci*. (*Ib.* *Rose vs. Clark*, 8 *Paige*, 574.) Such a marriage upon principles of national comity is good in France or in any foreign State. By the laws of New-York, a will of personal estate may be made in a prescribed mode by males eighteen years of age and upwards, and by unmarried females of the age of sixteen and upwards. Such wills of personalty are good and valid in New-York, and ought to be enforced abroad. The same principle of national comity in ordinary cases should give effect in all nations to divorces, sentences, judgments, judicial proceedings and decrees made in foreign nations, where the foreign tribunal had actual jurisdiction of all parties in interest by the personal and due service of process, or by their appearance in the suits or proceedings.

As real property has but one locality, all contracts relating to it, wherever made, must conform, of necessity, to the law of its locality.

SEC. 43. The doctrine of national comity applies with increased force among the States of our Union, which are qualified sovereignties forming one nation.

#### MARRIAGE AND DIVORCE.

SEC. 44. Matrimony is a high, holy and continuing mutual contract based upon the law of God, but it is simply a contract of the parties, for the violation of which different States afford relief according to their respective laws.

A marriage valid and legal according to the *lex loci contractus* is, by comity, good in all other States and nations. (6 *How.* 550. 8 *Paige's Ch. R.* 574, 580. 13 *Pick. R.* 66—68. 4 *Barb. S. C. R.* 301.)



A marriage contract made in a State confers originally on the husband and wife property rights, according to the *lex loci contractus*, as to all movable and immovable property within its jurisdiction, and as to all movable property wherever it is situated, unless the law of the place where it is located shall otherwise provide. (3 *Johns. Ch. R.* 190, 211. 13 *Pick. R.* 66—68. 4 *Barb.* 301.) As to realty, the property effect of a marriage or ante-nuptial contract is governed by the law of its locality. (*Story's Confl. L.* § 372, c. 428.) If an ante-nuptial contract be made regulating the rights of the husband and wife in each other's property, duly executed according to the law of the *lex loci contractus*, it will be valid, by comity, in all other States, as to real and personal property situated there, except so far as it conflicts with the laws of such other States. Neither an ante-nuptial contract, or any other act, can alien, or create an interest in, or lien upon realty, unless the contract as to form and effect is allowed by the *lex rei sitæ*, and that law alone, in all cases, governs dispositions of and liens upon realty. (17 *Martin's Louis. R.* 569. 20 *Johns.* 267. *Story's Confl. L.* 2d ed. §§ 158, 189, 454.)

We have shown that contracts made in one State, with reference to or to be performed in another State or nation, are, by comity, governed by the laws of the latter as a general principle. (*Le Breton vs. Miles*, 8 *Paige's Ch. R.* 265. 3 *Martin's Louis. R.* 60, 73.) On this ground the Louisiana tribunals hold that a marriage contracted in one State with a view to a permanent residence of the parties in another State, followed in a reasonable time by a domicile there, is governed, as to its property effect, by the laws of the latter State. (*Ib.* *Story's Confl. L.* § 180.) This seems right according to the general doctrine of the law of contracts. In cases of marriage without any ante-nuptial contract in a State, the *lex loci*

*contractus* must be deemed the law of the contract, *prima facie*, as in other cases, and the *onus probandi* would rest upon the party asserting the contrary. In the State of New-York, by acts of April 7, 1848, and April 11, 1849, the real and personal property of married women is secured to their separate use. If a marriage was contracted in New-York, or in any State having the like law or policy, it seems that an ante-nuptial contract in writing, duly executed, declaring a different regulation of the rights of the parties, ought alone to be received to take the marriage contract out of the operation of the *lex loci contractus*. (*Story's Confl. L.* § 130 a. 13 *Pet.* 65.)

DIVORCE.

For violations of the marriage contract any court of any State or nation having jurisdiction of the parties, by the personal service of process, within its territory, on the offending husband or wife, at the suit of the other, may grant relief, by divorce or otherwise, according to its laws. (*Greenl.* 140. 12 *Pet.* 527, 623. 13 *Wend.* 409. *Post*, § 44.)

And a *bona fide* domicil of the parties in any State of our Union is held to give jurisdiction to its courts to grant relief in such cases, according to its laws. (*Story's Confl. L.* 191, § 230 a.)

If parties domiciled in a State go to another temporarily, merely to get a divorce, in fraud of the policy and law of the former, the courts of the State of the true domicil will not give effect to a foreign divorce so obtained, and much less will they regard a divorce obtained *ex parte* by either husband or wife by a foreign legislative or judicial action. (*Ib.* 13 *Wend.* 409. 8 *Johns.* 194. 1 *Ib.* 431. 13 *Ib.* 204. 15 *Ib.* 121.)

In all cases of divorce granted in a State, its legislature

or court granting it, not having jurisdiction by due personal service of process or by the actual domicil of both parties, the tribunals of other States of our Union are not bound by comity to enforce such decrees, but they ought to treat them as void for want of jurisdiction and against sound public policy. (*Ib.* 11 *How.* 174.)

The Constitution of the Union, art. 4, § 1, requiring full faith and credit to be given in the States of our Union to the records and judicial proceedings of each other, has no bearing on the question of jurisdiction, and unless it appears by the record of a State court or legislature, duly authenticated, according to the act of Congress, that jurisdiction existed over the parties and subject, the courts of another State are not bound to give effect to such judgment, act or decree. (*Borden vs. Fitch*, 15 *Johns.* 121. *Story's Confl. L.* §§ 229 a, 230 a.)

The questions of want of jurisdiction and fraud in obtaining a judgment or decree, are open in our State courts when suits are brought or rights asserted under judgments and decrees of other States of our Union. (*Ib.* *Ib.* §§ 592, 609.)

If actual personal jurisdiction over both husband and wife, from domicil or personal service of process within a State, is obtained by its judicial tribunals, they may, according to its laws, make decrees of divorce that, by national comity, ought to be carried into effect by other nations and other States of our Union. Such valid decrees of courts or tribunals in our Union having such jurisdiction of both parties are legal, and bind the personal and property rights of the parties according to their tenor and effect in all our States and territories. (*Ib.* 13 *Pet.* 326. 12 *Ib.* 623. 1 *U. S. St. L.* 122. *Ib.* 298. 6 *Wheat.* 120.) The law of the *lex fori* governs as to the grounds, terms and effect of a decree of divorce,

or other decree founded on a violation of the marriage contract. (*Story's Confl. L.* § 23 a.)

State legislatures, in certain cases, are vested with judicial powers by their respective State constitutions. (2 *Pet.* 413. These bodies, acting as judicial tribunals, are bound by the principles above stated, and their acts and decrees of divorce or separation will be governed by them. (*Post*, § 44.)

If a State legislature, not acting judicially, grants a divorce on the application of either husband or wife without the consent of the other, such act, on principle, seems void. (9 *How.* 348. 4 *Hill*, 145, 146. 11 *How.* 174. 4 *Wheat.* 695, 696.)

#### CHANGE OF DOMICIL.

In case of change of domicile where there is no antenuptial contract controlling the property, the law of the new matrimonial domicile regulates the disposition of the property acquired there by husband or wife, or held by either of them at death. (17 *Marten's Louis. R.* 601. *Story's Confl. L.* 176.) This will be true as to real property within the State of the new domicile, and as to personalty in other States, except so far as the rule conflicts with the laws of other States where the property is located.

As to the marriage contract—the basis of families—legislatures and tribunals cannot be too careful in meddling with it. Legislative divorces seem highly exceptionable, legally and morally, as well as upon principles of public policy.

## FOREIGN JUDGMENTS AND DECREES.

SEC. 45. As a general rule of international law and comity, a definitive sentence of a court or tribunal, having jurisdiction of the parties and subject of litigation, regularly pronounced, ought to be received as final and just, and to be executed in all other countries in the mode prescribed by the *lex fori*. (*Vattel*, B. 2, c. 7, § 84. 9 *How.* 350, 413, 414. 4 *Cowen's R.* 520. 13 *Pet.* 312. *Story's Confl. L.* § 585.)

But the question of the jurisdiction of a foreign court, as well as whether the decree is impeachable for fraud, is subject to examination, and if the court had not jurisdiction, or the proceeding is fraudulent, a foreign judgment or decree will be disregarded. (*Rose vs. Himely*, 4 *Cranch*, 241. *Story's Confl. L.* 2d ed. §§ 592, 609. 2 *Kernan's R.* 165. 14 *How.* 339. 3 *Ib.* 750. 1 *Pet.* 340. 13 *Ib.* 511.)

All decisions relating to land or immovables made in the *forum rei sitæ* are final and conclusive, in all other tribunals, upon the parties duly brought before the original court, as to all questions of right and title therein. (*Story's Confl. L.* 2d ed. §§ 545, 551, 591. 16 *Pet.* 493.) Decisions of foreign courts as to realty are void. (*Ib.*)

This is the rule among the States of our Union, provided they do not contravene the provisions of the Constitution of the Union, or any treaty of the United States, or an act of Congress. (1 *U. S. St. L.* p. 92, § 34. 16 *Pet.* 493.)

## IN REM.

A judgment of a competent court of any State or nation proceeding *in rem* against property within its juris-

diction, decreeing its conveyance, sale, condemnation, acquittal or other act is, as a general rule, valid in all foreign tribunals. (*Story's Confl. L.* § 592. 10 *Wheat. R.* 473.) Such are the judgments of courts of admiralty, of the Exchequer in England, of our State and other courts. Proceedings by attachment by creditors are proceedings *in rem*. This last process is called attachment, garnishment or trustee process. (*Story's Confl. L.* § 592 a, p. 461, § 549. 4 *Cow. R.* 521. 20 *Johns. R.* 229.) Notices of all proceedings *in rem* should be given according to law. (4 *Pet.* 475.)

In those proceedings *in rem* by attachment for debts the sentence only binds the property seized, unless the debtor appears to the proceedings in due form so as to make it truly a proceeding *in personam* as well as *in rem*. Then the judgment will be enforced by foreign tribunals as one *in personam*. (9 *East R.* 192. 8 *Johns. R.* 194. 4 *Cow.* §§ 23, 24. *Story's Confl. L.* § 49. 6 *Wheat.* 129, §§ 546, 549, 592 a.) If there is no jurisdiction of the person it may still be valid as a judgment *in rem* only. (*Ib.* 15 *Johns. R.* 142. 8 *Ib.* 194,) though as a judgment *in personam* would be void. (9 *How.* 348, 350.)

## IN PERSONAM.

It is a generally conceded rule that judgments *in personam* are *prima facie* evidence to sustain an action, and are to be deemed right until the contrary is shown. (*Story's Confl. L.* §§ 603, 608. 8 *Johns. R.* 173. 4 *Cow.* 523.) They may be avoided if founded in fraud, or if the decree was made by a court not having jurisdiction of the cause. (*Ib.*) In case a foreign court in its decision misinterprets a contract, or the law of a foreign State where a contract was made, the judgment will not be

regarded as binding in the courts of the country of the contract. (*Story's Confl. L.* § 269. 4 *Cow. R.* 523.)

In *Novelli vs. Rossi*, (2 *Barn. & Adolph.* 757,) it was held by an English court that a prior French decree discharging a party from liability by a mistake of British law, was no bar to a suit in England to enforce the plaintiff's right, as it was founded on a transaction subject to English law.

In the United States, judgments of each State court, duly obtained, being by the Constitution entitled to the same faith and credit in every other State, are, as to their general validity, made domestic judgments. (*Story's Confl. L.* § 609. 13 *Pet.* 312, 326. 10 *Wheat. R.* 1.) But the jurisdiction of the court pronouncing the judgment may still be inquired into by another State court in which such decree is sought to be enforced. The authority of the State or nation, or of their tribunals, to take jurisdiction of the parties or of the subject, and the question of jurisdiction or of fraud in obtaining the judgment, may be investigated and must be decided in favor of their validity before the judgments of the courts of such State or nation will be carried into effect. (*Ib.* 8 *Johns. R.* 173. 4 *Cow. R.* 523. 15 *Johns. R.* 142. 11 *How.* 174.)

The jurisdiction and the regularity of the proceedings *in rem* of a foreign Court of Admiralty or other court, are open to examination in any tribunal of another country where a foreign sentence may be insisted on as changing the property. The same rule applies to judgments *in personam*. (*Story's Confl. L.* §§ 587—590. 4 *Cow. R.* 523.)

Judge Story, in his *Commentaries on the Conflict of Laws*, p. 492, § 586, there lays down the rule as to jurisdiction: "In order, however, to found a proper ground of recognition of any foreign judgment in another country, it is indispensable to establish that the court pro-

nouncing judgment should have a lawful jurisdiction over the cause, over the thing and over the parties. If the jurisdiction fails as to either, it is (as we have already seen) treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals. And this is equally true, whether the proceeding be *in rem* or *in personam*, or *in personam* and also *in rem*." (See, also, *Ib.* p. 449, § 539. See, also, 14 *Pet.* 75. 9 *How.* 348, 350.)

In accordance with this principle, if a vessel and cargo be condemned where no capture had been made by a belligerent; or if the sentence were pronounced by a court of the belligerent sitting in any country except the State to which it belonged, or that of an ally in the war; or if a vessel or cargo were condemned that was not within the territorial limits of the belligerent or such ally, or in the power of belligerent captors, though carried into a neutral port; in all these cases the sentence would be void for want of jurisdiction, and the decree would not affect the owner's title. (4 *Cranch*, 293. *Wheat. Hist. L. N.* 428, 429. *Vattel*, 6th Am. ed. 166, and n. 107. 8 *Term R.* 270—272, n. a. 1 *Rob. R.* 115, ch. 10, § 9; ch. 13, § 4 d, 41, 42, 72. *Story's Conf. L.* §§ 539, 586, 587, 588.)

Where a judgment or decree is made by a court of general jurisdiction, and the want of jurisdiction is not apparent on the face of the record, the proceeding is voidable only, and can only be set aside by proving the facts necessary to invalidate it. In courts of limited or special jurisdiction the facts necessary to give jurisdiction over the parties and subject must appear on the record, or it is void. (3 *Comst.* 193.)

A new tribunal may be erected, or new jurisdiction given to an existing court, to try past offences or existing rights claimed at the passage of the act, and they are not



*ex post facto*, but legal and valid. Such laws are regulations of remedies and modes of judicial action, and do not affect existing rights. (11 *Pick. Mass. R.* 32.)

If a consular tribunal of a belligerent, acting as a prize court, under the orders of his government, and sitting in a neutral country, condemns a vessel and cargo as lawful prize, and decrees a sale of them, the proceedings are illegal and void, as such courts, by the law of nations, must sit either in the country of the captors or in that of an ally in the war. And such illegal sale would not change the property.

In *Webster vs. Reis*, (11 *How.* 437, 458—460,) a State law of Iowa authorized suits to be brought against owners of the half-breed lands, by notices published in a newspaper, without any personal service or attachment of the lands, and the court, without a jury, was empowered to give judgments against the owners of the lands, and on such a judgment the lands were sold on execution; the law was held by the Supreme Court of the United States unconstitutional, and the judgment and sale a nullity.

In *Rathbone vs. Terry*, (1 *Rhode Island R. by Angell*, 73,) it was properly held that a judgment in Connecticut against a citizen of Rhode Island, not personally served with process, was null and void, and formed no ground of action against the defendant.

In *D'Arcy vs. Ketcham*, (11 *How.* 174—176,) where there were two joint debtors, one residing in Louisiana and one in the State of New-York, and under a New-York law process was served on the partner there, and a joint judgment taken for plaintiff against both partners, the non-resident not having been served with process, and not appearing, the Supreme Court of the United States decided that such judgment as to the defendant not served was of no effect, and that no nation or State is bound to enforce judgments "merely against the person,

where he has not been served with process nor had a day in court;" that "national comity is never thus extended."

The court also, in this case, held that the constitutional provision requiring full faith and credit to be given to the public acts, records and judicial proceedings of the States throughout the Union, had no application, as, by the international law of the States prior to 1790, no judgment or decree could be given in one State so as to bind a citizen of another, unless the defendant had been served with process, or voluntarily appeared to the suit, "because neither the legislative jurisdiction, nor that of courts of justice, had binding force" in other States; and that in the courts of other States such judgments *in personam* were held void, and that the national Constitution had not changed this rule of international or inter-state law.

This case seems to decide that full faith and credit in our Union is to be given only to valid decrees and judgments.

A State law allowing a divorce *ex parte*, with no jurisdiction of the defendant, will protect a marriage, pursuant to its laws, from penal consequences, though it may be entitled to no extra territorial effect, and may be void as a law infringing the marriage contract. (15 *Wend.* 131. 9 *Ib.* 379. 4 *Wheat.* 695, 696.)

In the case of *Glover & Campbell vs. Porter*, (12 *Missouri R.* 498, 499,) the Supreme Court of that State decided that a statute of Missouri of 1835 declares marriage a civil contract, and that the legislature had no power to pass a law to dissolve a marriage. The court said, that to sanction such a law interfering with the contract would be scarcely less exceptionable, upon the score of public justice, than it has heretofore been deemed to be incompatible with public policy and the constitutional distinction of the powers of government.

In England and all the States of our Union marriage is

held to be a civil contract, and it is difficult to see why it is not within the protecting clause of the national Constitution prohibiting the States from passing laws impairing the obligation of contracts.

#### INVALIDITY OF DECREES, JUDGMENTS, &c.

By the law of nations, a judgment or decree of a foreign court still in force there, where the tribunal had jurisdiction of the parties and the subject-matter, as a general rule will be held valid, by national comity, in a foreign tribunal, unless the decision has been made on a mistake of the *lex fori*, or appears to be unjust. In such case the mistake or injustice will be corrected. (*Wheat. Hist. L. N.* 196—198.)

In our Union, where a State court or a territorial or other court or tribunal had jurisdiction of the parties and the subject-matter decided, there being an actual service of process on the defendant within the limits of the State or territorial jurisdiction, a judgment, or decree, or decision unreversed or unsatisfied, is valid and conclusive in all courts of the Union. (3 *Wheat.* 234. 4 *Pet.* 472. *Story's Confl. L.* § 609. 21 *Wend.* 302, and other cases cited in this section.)

All judgments, decrees and adjudications of any court or tribunal may be shown in any court, either of the same country or in any foreign nation, or in any State or territory of our Union, to be void: 1. By reason of a want of jurisdiction of the parties; 2. Of the subject-matter decided; or, 3d. Of fraud in procuring it. (*Elliot vs. Piersol*, 1 *Pet.* 340. *Story's Confl. L.* § 609. *Taylor vs. Bryden*, 8 *Johns.* 173, 177. 2 *Johns. Ch. R.* 512. 20 *Wend.* 265. 4 *Selden's N. Y. Ap. R.* 254. 5 *Paige's Ch. R.* 305, 306, and cases there cited. 19 *Johns.* 41. 4 *Pet.* 471, 472. 8 *How.* 255, 256. 9 *Ib.* 349, 350. 11 *Ib.* 174.)

In *Shedden vs. Patrick*, (18 *English L. & Eq. R.* 63,) it was held in the House of Lords, on the authority of the Duchess of Kingston's case, that a judgment of the House of Lords, obtained by fraud and collusion, was a nullity, and might be so treated by any court.

In the case of *Elliot vs. Piersol*, the Supreme Court of the United States say, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision is correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings. (4 *Pet.* 471.)

From these well-settled doctrines it is obvious that no court or tribunal can decide the question of its own jurisdiction, so as to prevent other courts and tribunals from re-examining that point. Hence, it would seem that where an act of Congress or State law confers on a court, a commissioner or any other tribunal, power to discharge bankrupts or insolvents on their petition, &c., except only such as have made voluntary assignments, preferring creditors, all discharges of persons on their application who can be proved to be within the exception, must, upon principle, be void for want of jurisdiction.

In *Hollingsworth vs. Barbour*, (4 *Pet.* 475,) the Supreme

Court of the Union say that it is an acknowledged general principle, that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded on the immutable principle of natural justice, that no man's right shall be prejudiced by the judgment or decree of a court, without an opportunity of defending the right. This opportunity is afforded by a citation or notice to appear, actually served; or constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service. The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule.

They are not properly exceptions; the law regards the seizure of the thing as constructive notice to the whole world; and all persons concerned in interest are considered as affected by this constructive notice. But, if these do not form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized and taken into the custody of the court. The case under consideration is not properly a proceeding *in rem*; and a decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on the party. There is no seizure or taking into the custody of the court of the land, so as to operate as constructive notice. If a decree is made in one State, dissolving a contract for sale of lands in another, and a lien is decreed for advances and a sale ordered, the decree is void as to the lien and sale for want of jurisdiction. (9 *Pet.* 289; 9 *Barb. R.* 638.)

It would seem that in all cases, except proceedings *in rem*, actual service of process within the territory of a State

or nation is necessary to give jurisdiction and make the judgment decree or order of a State tribunal valid and binding *in personam*, beyond the territorial limits of the State or nation. It would follow that any act of a State legislature or of Congress, conferring on a tribunal power to make decrees or judgments, except in proceedings *in rem*, or as to property within their territorial limits, without such due personal service of process, affecting the personal or property rights of persons, would seem to stand condemned by the spirit of American law. (*Ib.* 4 *Hill*, 146. 5 *Barb. S. C. R.* 474. 17 *Johns.* 203. 4 *Barb. S. C. R.* 301, 302. 2 *Kernan N. Y. Ap. R.* 211, 212.)

This doctrine naturally results from the principle of law laid down in the national and most of the State constitutions, declaring that a man's rights of person and property shall not be taken away from him without due process of law. (*Ib.* 9 *How.* 348.)

In *Westervelt, Exr., vs. Gregg*, (2 *Kernan R.* 209, 211, 212,) the New-York Court of Appeals held that the statute of New-York of 1848, vesting in married women the exclusive control of property devised or given to them during coverture, free from all right of their husbands, had no effect on legacies to wives then complete by the death of the testators. The court said the constitution of the State, by declaring that "no person shall be deprived of life, liberty or property without due process of law," meant due process, in the course of legal proceedings, according to those rules and forms which have been established for the protection of private rights; that an act of the legislature is not such process. And the court referred with approbation to *Taylor vs. Porter*, (4 *Hill*, 140,) as a true exposition of the law.

Jurisdiction of a case is acquired in one of two modes, first, as against the person of the defendant, by the personal service of the process, or secondly, by a procedure

against the property of the defendant, within the jurisdiction of the court. In the latter case, the defendant is not bound by the judgment beyond its effect on the property judicially or *in rem*. (9 How. U. S. R. 336, 348, 349, 350.) In this case, the court held a judgment *in personam*, in Ohio, founded on a statutory published notice to defendants living in other States, *coram non judice* and void, and that the proceeding was *in rem* only. The court say: "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court."

The Court of Appeals of New-York, in *Dobson vs. Pearce*, (2 Kern. 164,) held that a judgment of a court of competent jurisdiction cannot be collaterally impeached for error or irregularity. But that the jurisdiction of the court was always open to inquiry; and that if it exceeded its jurisdiction, or had not acquired jurisdiction of the parties by the due service of process or by a voluntary appearance, the proceedings were *coram non judice*, and the judgment void. That the want of jurisdiction is a valid defence to an action upon a judgment, and a good answer to it when set up for any purpose.

In that case, (p. 165,) the same court declared that fraud and imposition invalidate a judgment, as they do all acts, and that at law and in equity they may be set up in avoidance of a judgment so obtained, and a court of equity may relieve a party from such a judgment.

The Court of Appeals of Kentucky, in *Brown vs. Given*



et al. (4 *J. J. Marshall's R.* 30,) lays down the true principle of our American law as held in all our States and in the courts of the United States. The court say: "It is a principle of the common law, founded on justice, and resulting from the objects of all judicial proceedings, that a judgment or judicial order of a court cannot affect any person who is neither party nor privy to it. And it is equally well settled that no person can be considered a party to a judicial proceeding unless he shall have notice of its pendency. In some cases constructive notice is made sufficient, *sub modo*, by statute."

#### SALES FOR TAXES AND ASSESSMENTS.

Sales for assessments and taxes are in the nature of proceedings *in rem*. In such cases those who claim title to real or personal property, under such proceedings, are bound to prove that all the requirements of the *lex loci* have been strictly complied with, or the title fails and the transfer will be held void. The statutory notices and acts necessary to a transfer of title must be shown by the claimant as against the owner, agreeable to the local law. (4 *Hill*, 76—86. 7 *Cow.* 88. 20 *Wend.* 241. 6 *Wheat.* 119. 7 *Wend.* 148. 9 *How.* 350. 1 *McLean's R.* 327. 7 *Barb. S. C. R.* 133. 4 *Wheat. R.* 77. 3 *Denio*, 598. 1 *Comst. R.* 79. 2 *Ib.* 66. 19 *Wend.* 676. 14 *Pet.* 328. 4 *Ib.* 359.)

#### LEGAL SALES.

In all sales by public officers of real estate, the statutory authority must be strictly pursued or they will be void, as being made without authority, unless the local law shall otherwise ordain. (3 *Comst. R.* 400, 401. 2 *Ib.* 66. 6 *Wheat.* 125, 126.)



The regularity of the sale must appear on the deed or certificate of sale, or it will be void. (6 *Wheat.* 125, 126.)

In considering all questions of taxes and assessments, the local law, as fixed by statutes and decisions of the State tribunals, is the general rule followed by the Supreme Court of the United States. (14 *Pet.* 328.)

While the provisions of all laws which claim to divest rights of property are to be strictly construed, those allowing redemptions from sales are to be liberally expounded, in favor of redemptions by owners and parties interested in the property. (10 *Pet.* 22, 23.)

Though the laws of the different States of our Union are various, the general principles above stated may be considered as the public law of the United States, and as applicable to all such State and other laws, however various in their character and provisions.

Though such taxing and assessment proceedings are not subject to the above rules requiring personal service of process to give jurisdiction, unless the *lex loci* shall so require; and although they partake in some degree of the nature of proceedings *in rem*, the spirit of the great elementary principle of American public law, that no man shall be deprived of his life, liberty or property without due process of law, and an opportunity to protect and defend them before an appropriate tribunal, should, as far as practicable, be applied by legislative bodies and judicial tribunals.

All taxes and assessments are apportioned by assessors, commissioners or officers, who act judicially in assessing them, and unless they have a jurisdiction conferred by law, their acts are void. (3 *Denio's R.* 119. 5 *Barb. S. C. R.* 611.)

In *Boswell's Lessee vs. Otis*, (9 *How.* 348,) the Supreme Court of the United States decided: 1. That the jurisdiction of a court making a decree or giving a judgment,

may be examined collaterally in any court where a right is set up under it. 2. That jurisdiction is obtained by a court, first, as against the person of the defendant by the service of process; or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. That in the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceedings against the property be by attachment or bill in chancery. That a bill for specific performance is ordinarily a proceeding *in rem*; and that it is always such when authorized by statute publication of notice and without personal service of process.

The court say, (p. 350,) that no principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. This is an established principle of American public law.

The same court decided in *Lessee of Hickey vs. Stewart*, (3 *How.* 750,) and *Williamson vs. Berry*, (8 *How.* 541, 542,) that the jurisdiction of the highest courts might be collaterally inquired into, and if want of authority to make the decree or give the judgment was proved, the same would be held void. (See 1 *Cush. Mass. R.* 564. 1 *Denio's R.* 75.)

#### COURTS-MARTIAL AND MARTIAL LAW.

Courts-martial are tribunals of special and limited jurisdiction, and their action must be confined to persons and matters within it, or their judgments and acts will be void for want of authority. In case of illegal assumption of jurisdiction over persons, by *habeas corpus* they may be liberated from the power of such courts.

All action of courts-martial upon persons or property not subject to and within their legal jurisdiction, and all military control or martial law exerted without authority of law, may be treated as void by the State or national courts having jurisdiction of the case, and relief may be granted by *habeas corpus*, or by action, or both, as the case may require. (19 *Johns. R.* 7. 20 *Ib.* 343. 10 *Ib.* 328. 12 *Ib.* 257. 9 *Ib.* 239.)

In cases where a party not subject to the martial law is deprived of his liberty, the officer or person arresting him, and the commanding officer by whose orders the arrest is made, are trespassers, and liable to an action as such. (*Ib.* 12 *Ib.* 257.)

Where a soldier or other party is by law subject to military control, State courts will not revise its exercise, if agreeable to military usage, and not opposed to any act of Congress. (14 *Ib.* 235.)

Where an army of the United States is in a foreign country, and an officer acts in a joint military and civil capacity, cases arise of great difficulty.

A temporary conquest by the United States confers on the conqueror the right to supersede the existing law of the conquered country, and to substitute a temporary civil government over the people within the territory. (4 *Wheat.* 254, ch. 13, § 7.) Now, the laws of the United States are not by such conquest by our army extended over it. (9 *How.* 618.) Of course no State law is carried there. The government is a military one, under the President of the United States. (*Ib.*) Now, it would seem that any act in accordance with the orders of the President, as represented by the commanding officer ruling the conquered country, must be deemed legal, unless subsequently annulled by the President, or a superior officer representing him. (*Ib.*)

It is difficult to see upon what principle an officer can

be held responsible to a civil action in any tribunal for such governmental acts on person or property, if his acts are previously authorized, or subsequently expressly or impliedly ratified. (9 *How.* 618. 13 *Ib.* 115. 17 *Johns.* 52, 53.)

Such acts seem to be executive governmental acts regulating our foreign relations, and not properly revisory in any of our courts, or those of foreign nations. (*Ib.*)

Such temporary rulers ought to respect the law of nations, and to administer the municipal law of the conquered people as far as practicable.

These principles seem applicable to all foreign conquests, and to the military government of the conquerors.

## BANKRUPTCY.

SEC. 46. A bankrupt law of any nation is part of its municipal law, and of course confined in its force, as law, to its own territory or to its own citizens. And a bankrupt discharge of Great Britain, or any other nation, has no effect on the rights of a creditor living in another country. (*McMillan vs. McNeill*, 4 *Wheat. R.* 208, 210, 212. *Ante*, § 11. *Ogden vs. Saunders*, 12 *Wheat.* 360, 361.)

In the United States a general bankrupt law cannot have any extra-territorial effect.

Our State insolvent laws are governed by the same principles, and are confined to the respective territories of the States and to their own citizens. (12 *Wheat.* 359, 369. *Cook vs. Moffatt*, 5 *How. R.* 308, 309. *Boyle vs. Zacharie*, 6 *Pet.* 635. 14 *Ib.* 75. 26 *Wend.* 44.)

The discharge of a debtor by a bankrupt or insolvent proceeding is in its nature a judicial act, (*Ib.*) and hence, upon general principles, a want of jurisdiction over a foreign creditor must leave his personal rights intact. And a decree discharging his debt in a foreign tribunal is

simply a nullity, for total want of authority, upon principles of international jurisprudence and natural equity.

A bankrupt law is an act of sovereignty, and can have no effect extra-territorially but by comity. (1 *How.* 273.)

In the case of Klein, in the Circuit Court of the United States, (1 *How.* 277—281,) Mr. Justice Catron decided: 1. That Congress had power, by the act of 1842, to authorize voluntary as well as involuntary bankruptcies; and that the constitution imposed but one limitation on the power of Congress, and that was that such laws should be uniform throughout the United States. 2. That the States of our Union can pass no law affecting debts due a non-resident, because no jurisdiction exists of his person; they can impair no contract made out of the State, because it was not made subject to the State insolvent law.

3. The learned judge decided that a discharge in one sovereignty from contracts, is, by the law of nations, not recognised as a discharge in another sovereignty, save on the ground of comity; that an assignee under the British bankrupt laws is not recognised in this country as owner of the debts of the bankrupt; and that an attaching creditor, or the government, may disregard a title set up by the foreign assignee. (*Harrison vs. Sterry*, 5 *Oranch*, 298.) The States in this respect are foreign to each other, and would be little likely to extend comity to the discharges of each other; from which great confusion might follow, and much ill-will.

It is settled, therefore, that our State municipal sovereignties, in the absence of a United States bankrupt law, may pass State insolvent or bankrupt laws, but that they can only discharge contracts made between their citizens respectively, and subject, by legal intendment, to such law as part of the contract; both parties to it, as well as the

contract, being subject to the discharging law and the State sovereignty that enacted it, thus giving complete jurisdiction.

In our Union, therefore, a State bankrupt or insolvent discharge of a debt due to a non-resident is, as to him, a nullity for want of jurisdiction; and the assignees could get no title to property in other States as against attaching creditors or purchasers there. Comity requires no extra-territorial effect to be given to such laws.

The Constitution of the Union prohibits any State from passing any law impairing the obligation of existing contracts, and hence all State insolvent laws discharging contracts then existing are void, even as to the citizens of the same State, and the federal and State courts are bound to declare them invalid. (*Sturges vs. Crowningshield*, 4 *Wheat.* 122, 191. 14 *Pet.* 75. *Ante*, § 11. 5 *How.* 308, 309.)

A general United States bankrupt law suspends all State insolvent laws which are inconsistent with its provisions. (4 *Wheat.* 196.)

It is a principle of bankrupt laws that the property of the debtor shall be equally distributed; hence such laws make void all voluntary transfers made by him to give some creditors preferences. The 2d section of our late national bankrupt act of 1842 contained such a provision, and declared such preferences a fraud upon the law, and prevented the granting of a discharge to such fraudulent debtor on his own petition, though it subjected him to be declared a bankrupt for such acts on the petition of a creditor. (1 *U. S. St. L.* 442. 3 *Story's C. C. R.* 446, 447. 2 *Ib.* 349. 7 *How.* 627. 6 *Ib.* 209. 3 *McLean's C. C. R.* 186, 595.) ✓

Where the bankrupt act makes the discharge invalid and illegal in consequence of such preferences, the fact of such preferences may be shown collaterally or directly,

and the fact appearing, the discharge will be held void. (*Ib.* 1 *Cushing's Mass. R.* 571. 8 *How.* 540, 541. 1 *Denio's R.* 75. 3 *Yeates' Penn. R.* 138.)

In the United States, national bankrupt laws must, by the constitution, be uniform; and they may, as in the act of 1842, allow a discharge to a debtor upon a voluntary petition of the debtor or of his creditors. (1 *How.* 279.)

As the title of foreign assignees in bankruptcy to property in the United States is not recognised, the government or creditors may attach it as the property of the original debtor. (1 *How.* 279.) The doctrine is also applicable to our States. (Klein's case, 1 *Ib.* 277—281.)

And where fraudulent preferences have been given by bankrupts in the United States to persons having notice of their insolvency or bankruptcy, the assignees have sued for and recovered the property, as the assignments or conveyances were void. (6 *Ib.* 209. 7 *Ib.* 627.)

A creditor, whose debt is not affected by a foreign discharge, or by a proceeding where no jurisdiction over him existed, may, by accepting a dividend or becoming a consenting party to it, discharge his debt. (3 *Pet.* 411. 26 *Wend.* 54. 2 *Kent's Com.* 293, 3d ed. n. *Baldwin's C. C. R.* 296. 8 *Barn. & Cressw.* 477.)

As judicial authority is generally co-extensive with legislative power as to territorial jurisdiction over parties or subjects of adjudication, (5 *How.* 115,) no State court or tribunal of any kind can give any extra-territorial effect to its judgments or decrees, except by acting on the person of the party before the court, in certain cases of equitable cognizance. (*Ante*, §§ 11, 44. 3 *Sandf. Ch. R.* 188. 2 *Paige's Ch. R.* 615. 6 *Cranch*, 158. 9 *How.* 348, 350. 4 *Hill's R.* 145, 146. 5 *Barb. S. C. R.* 474, 484.)

In *Oakley vs. Bennett*, (11 *How.* 44,) the Supreme



Court of the United States held, that though the rule is otherwise in England, "a statutory conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." In this case, an assignee of an American bankrupt claimed land in Texas belonging to the bankrupt, that country being, at the time of the decree of bankruptcy, a foreign nation, but the court held, that the "act of Congress could have no extra-territorial effect; that Texas was an independent republic at the time of the decree in bankruptcy, and, consequently, no claim under it, even as regards personal property in that republic, could be made, except on the ground of comity. And on our own principles this could not be done to the injury of local creditors." The court decided that the assignee took no title to the Texas land under the decree vesting him with all the bankrupt's estate. (p. 45.)

It has been held by the Supreme Court of Connecticut, that where a contract was made between two citizens of another State, and the creditor sued and obtained judgment in Connecticut, and afterwards the debtor was discharged from his debts in the State of such contract, an execution might issue to collect the judgment notwithstanding the discharge. (3 Conn. R. 523.)

In *Donnelly vs. Corbett*, (3 Selden's R. 500,) the New-York Court of Appeals decided, that where a merchant of South Carolina bought goods at New-York of a mer-



chant domiciled there, and gave a note for the price, payable in Charleston, South Carolina, and failed to pay it, and was sued and judgment recovered in the latter State, and the debtor was afterwards discharged, under a State law, from all his debts, that in such case the judgment of the New-Yorker was not affected by the discharge, and that a suit might be maintained on it.

The court held, that the construction and effect of this contract were to be ascertained by the laws of South Carolina, but that the insolvent laws of that State formed no part of the contract, and the court referred to 5 *How. U. S. R.* 311. A discharge from debts was held to be an act of sovereignty founded on State policy. It was held, that the suing the debtor and imprisoning him in Carolina did not subject the non-resident plaintiff to the Carolina jurisdiction, except for the purposes of the suit, and that the discharge was without effect on the judgment, as the creditor was not a party to the proceeding, and received no dividend under it.

Where an Englishman, domiciled in England, departed from England with movables, and while on the high seas he was adjudged a bankrupt in England, and on his arrival in New-York, English creditors and the provisional assignee in bankruptcy, all British subjects, filed a bill against the bankrupt, and collector of New-York having possession of the property, praying an injunction against a delivery of the goods to the bankrupt, and restraining him from receiving them, the alleged bankrupt denied his insolvency, his bankruptcy, and alleging that he came on business to New-York, and that he intended to return to England. An injunction to that effect had been granted, and the chancellor refused to dissolve it, on the ground that as all the parties were Englishmen, the English bankrupt law passed the title to the goods to the assignee in bankruptcy. He also held, that if American

attaching creditors had appeared, they would have been entitled to a preference over the foreign assignee. The chancellor said: "Under the circumstances, the assignment had the effect to change the property and divest the title of the bankrupt as effectually as if the same had been sold in England under an execution against him, or had voluntarily conveyed the same to the assignee for the benefit of his creditors." That if "no act of bankruptcy has been committed, he must apply to the proper tribunal of his own country to supersede the commission; for while it remains in force, the adjudication of the commissioners is conclusive against him as to that fact."

## FOREIGN DIVORCES.

SEC. 47. The dissolution of a contract by a bankrupt law of any nation, or of any State of our Union, cannot be effected so as to entitle it to recognition by comity in other States and nations, unless jurisdiction was duly obtained over both parties by due service of process, or voluntary appearance or consent. The same rule of public law applies to foreign divorces. And a legislative act, or the judgment of a tribunal not having obtained jurisdiction of the subject-matter, and of both parties, agreeable to the principles laid down in this chapter, would seem to be utterly void, and a simple nullity for want of authority. (*Ante*, §§ 44, 45.)

In the States of our Union the great principle of American law, consecrated by the national and State constitutions, that no person shall be deprived of life, liberty or property without due process of law, makes void all legislative or judicial *ex parte* decisions, laws or decrees affecting any personal or property rights, where an opportunity to defend them is not allowed in a fair judicial way. (12 *Missouri R.* 498. 4 *Comst. N. Y. R.* 230. 4 *Hill*, 145,

146. 5 *Barb. S. C. R.* 474, 484, 485. 9 *How.* 348, 350. 11 *Ib.* 174.)

Unless jurisdiction of both husband and wife are duly obtained, it would seem, upon principle, that the State law or decision of the tribunal annulling a marriage contract would be void, and simply a nullity, except in the State in conformity with whose laws it is made. This is a principle of American public law.

#### EXTRA-TERRITORIAL JURISDICTION AS INCIDENT TO PERSONAL SERVICE OF PROCESS.

SEC. 48. If process is personally served on a defendant within the jurisdiction of any court of any country, he may, after due trial, be decreed to execute or dissolve a contract relating to lands beyond the territorial limits of the country and tribunal, or to do any act necessary to transfer, encumber or disencumber such realty, or to pay any sum due to plaintiff for any fraud of defendant relative to such property, or for any trust or contract relative thereto. The Court of Appeals of New-York, in 1853, in *Bayley vs. Ryder*, decided that the Supreme Court of that State had power to compel a judgment-debtor to convey lands held by him in another State, in such manner as to vest the title in the grantee, for the benefit of creditors. In *Massie vs. Watts*, (6 *Cranch*, 148,) the Supreme Court of the United States held the above doctrines in conformity to the settled principles of the English chancery. In *Tardy vs. Morgan*, (3 *McLean's C. C. R.* 359, 360,) the same was held. To the same effect are *Hopkins' N. Y. Ch. R.* 213. 10 *Vesey*, 164. 1 *Ib.* 444. 3 *Ib. Jun.* 170. 2 *Paige's Ch. R.* 402, 615, 616. 3 *Sandf. R.* 185. 9 *Pet. U. S. R.* 289. 9 *How. U. S. R.* 348, 350. 16 *Ib.* 13. 6 *Pet.* 397, 400, 401. 14 *Ib.* 166. 16 *Ib.* 57. 2 *Story's Eq. Juris.* § 743. 3 *Kernan's N. Y. R.* 591.

According to these authorities a mere question of title is local, and must be tried in a tribunal of, and according to the *lex loci* of the realty; and that a foreign decree cannot, *proprio vigore*, create a lien on lands in a foreign State or nation. "But," to use the language of the Supreme Court of the United States in *Massie vs. Watts*, "where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

A court of equity, having jurisdiction of both parties, may compel them, by attachment for contempt or other process, to execute a decree, in such case, in reference to lands in a different State or country from that of the tribunal. In this mode, and to this extent, a court, by a proceeding *in personam*, or personal service of its process within its jurisdiction, may act incidentally on lands in other States and countries. (3 *Kernan's R.* 591, and cases above cited.)

Trustees, appointed pursuant to local statutes, such as assignees in bankruptcy or State insolvent assignees, canal commissioners, treasurers, executors, administrators, guardians and other like officers, cannot, as a general rule, be sued and called to account in other States or in foreign nations. Their obligation is to account to the proper officer within the territory appointing them; and it might do such officers and trustees great injustice to prosecute them, and compel them to account in another State of our

Union or in a foreign nation, far from their proofs, while on a temporary visit abroad.

In the United States, trustees removing from one State to another, may still execute their trusts ; and *ex necessitate* may there be called to account before a court having equity jurisdiction agreeable to the law of the State appointing them. The same rule is applicable to foreign local officers and trustees coming to reside in any State of our Union. (4 *How. U. S. R.* 467. 14 *Pet.* 166, 167. 7 *Paige's Ch. R.* 239. 5 *How.* 259. 16 *Pet.* 57. 3 *Sandf. R.* 185. 2 *Paige's Ch. R.* 615. 7 *Martin's Louis. R.* 158, 159. 1 *Barb. Ch. R.* 214.)

In *Vaughan vs. Northrop*, (16 *Pet.* 5, 6,) the Supreme Court of the United States declare that administrators are liable ordinarily to account only to the proper tribunal of the State appointing them. The court say : " Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State ; and whenever operation is allowed to it beyond the original territory of the grant, it is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he receives, by virtue of his administration, to the proper tribunals of the government from which he derives his authority ; and the tribunals of other States have no right to interfere with or control the application of those assets according to the *lex loci*. Hence it has become an established doctrine, that an administrator, appointed in one State, cannot, in his official capacity, sue for any debts due

to his intestate in the courts of another State; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due there his intestate." (See 4 *Edw.* 343. 2 *Paige's Ch. R.* 403. 10 *Ib.* 556. 4 *How.* 497, to the same effect.) The last case shows that if the same person takes out letters of administration in different countries in the reference to personalty in each, a judgment in the courts of one country in reference to the next of kin, or any other question, creates no estoppel, and is not evidence in any future controversy in the courts of the other State relating to property there.

In the case of *Vaughan vs. Northrop*, the court say, that in peculiar cases one jurisdiction may transmit assets to a foreign jurisdiction to distribute, as a matter of comity and convenience; but that is a question depending on the *lex loci*.

The same doctrine is applicable to executors and guardians. It seems applicable, also, upon principle, to all trustees appointed by the tribunals of a State, as their officers or agents, to manage money or property.

If no necessity exists, the courts of a foreign State will not take cognizance of such trustee cases. (2 *Paige's Ch. R.* 403.) This rule is one of comity and convenience. Few men would be found to be executors, administrators, guardians, receivers, trustees, under State insolvent laws, or other like trustees, if they were liable to be sued and called to account before a foreign tribunal, if they happened to pass into an adjacent or distant State. Suppose such legal administration of property granted in California, and the trustee should visit New-York for pleasure or business, a suit against him there for account would be against comity, and would be oppressive.

Considering the great extent of our republic, stretching from the Atlantic to the Pacific, and from the St. Law-

rence to the Rio Grande, these doctrines must be held to be an essential part of our public law.

But where a foreigner must be sued abroad, or there will be a failure of justice, he may be compelled to pay abroad. (7 *Cowen's R.* 645.)

#### PRIORITY OF ADMINISTRATION.

SEC. 49. In our Union, where administration is granted at the place of the intestate's domicil, it is conclusive on the courts of other States. (16 *Conn. R.* 127.)

Where two administrations are granted in adjacent States, and some of the property is passing from one State to the other at the time of the death of the intestate, as stages with his horses, the one that first reduces the property to possession holds it. (3 *Paige's Ch. R.* 465.)

Where there are several administrations in different nations or States, they are confined to property within their own respective States or nations. (4 *How.* 467.)

#### FOREIGN TORTS AND MARINE TRESPASSES.

SEC. 50. Marine trespasses or collisions may happen from the wrongful act or the gross negligence of the master of a vessel on the high seas, or within the maritime curtilage of a foreign country. The action in each case is transitory, and may be brought in any admiralty court, or in any common law or other court having a concurrent jurisdiction. (6 *How.* 344. 18 *Johns.* 257. 1 *How.* 28. 1 *Gallis.* 75. 2 *Ib.* 29, 41.)

If the collision occur within a foreign jurisdiction, its law governs the case as to its merits. (1 *How.* 28.)

In all other cases the *lex fori* governs. This rule applies to a wrongful imitation here of foreign trade-marks. (2 *Wood. & Minot's R.* 1.)



The admiralty has jurisdiction of personal torts committed on the high seas, and as to such the *lex fori* governs the case. (3 *Mason's R.* 242.)

SEC. 51. In all tribunals the *lex fori* governs in all cases, unless a foreign law is alleged and proved.

In *Allen, administrator, vs. Thomason*, (11 *Humphrey's Tenn. R.* 356,) it was held by the Supreme Court of Tennessee, that where the father of minors died domiciled in Tennessee, and their mother afterwards married a man, and he removed her and her children, first to the State of Arkansas and then to Mississippi, and one of the minors died there, that the legal domicil of the minor at his death was Tennessee, where his mother became his guardian after his father's decease. The court held that the removal was the act of the step-father, and that he had no power to change the minor's domicil, and that the minor had no such power during minority, and that the estate of the minor was subject to distribution according to the laws of Tennessee.

In *Robinson vs. Dauchy*, (3 *Barb. S. C. R.* 29,) the Supreme Court of New-York held, in relation to a transaction in another State, in litigation in that case, that in the absence of proof of the law of such State, it was to be deemed to be the same as the laws of New-York, that *prima facie* a foreign law will be taken to be like that of the *lex fori*, and that the party alleging a different rule of law must aver and prove it. (See, also, 2 *Hill*, 201, 202. 22 *Wend.* 322—324. 2 *Hill's S. C. R.* 319. 22 *Wend.* 285, n.)

#### FOREIGN PENAL AND CRIMINAL LAWS.

SEC. 52. All penal and criminal laws are purely local, and no nation or State is bound by national comity to regard or enforce foreign penal and criminal laws. (14



*Pet.* 574. 10 *Wheat.* 66, 123. *Ib.* 66. *Story's Conf. L.* §§ 520, 540. 14 *Johns.* 338. 5 *Cowen's R.* 665, n.) Nor are they bound to regard foreign disabilities of any sort. (*Ib.*)

This is the rule between the States of our Union, except so far as fugitive criminals and persons bound to service flying from one State into another are required to be given up by the mandate of the Constitution of the Union. (*Ante*, ch. 40. 10 *Serg. & Raw.* 125. *Story's Conf. L.* § 627.)

States may, if they please, make laws to punish fugitive criminals entering their territories. (11 *Pet.* 102. 14 *Ib.* 568, 569.)

This State power is subject, however, to the paramount control of our treaties and acts of Congress. (*Ib.* 7 *How.* 283.) The power of excluding or punishing foreign fugitive criminals belongs to all nations. (*Ib.*)

#### EXTRA-TERRITORIAL MARTIAL LAW.

SEC. 53. Armies are *quasi* sovereignties, carrying with them, subject to the laws of their respective nations, the powers of external as well as internal government, military and civil. Hence, when armies or navies conquer in war maritime places or cities, the territory of an enemy, of necessity a temporary *quasi* civil, but real military government, must be established for the safety of the conquerors and the welfare of the conquered people. When Mexico forced a war upon our republic in 1846, our gallant army and navy were soon in possession of a large portion of Mexico, and were obliged to assume the powers of government in place of the displaced Mexican sovereignty. Custom-houses were established in the Mexican ports, duties collected, governors appointed,

police regulations established, and all temporary regulations made and enforced by military power for the good government of the conquered Mexicans. Their municipal laws and regulations were left to them, but the enforcement thereof was superintended by the military power of the conquerors. All this was done, as well as the levy of military contributions on the public finances of the country, by authority of the President, as commander-in-chief of our military and naval forces.

The Supreme Court of the United States, in the case of *Page*, collector of Philadelphia, has decided that this extra-territorial military rule was legal, as belonging to the military power of the President in time of war. (See 13 *How.* 115. 4 *Wheat.* 254. 9 *How.* 618.)

It is highly honorable to our American generals that their civil rule of the Mexicans was as humane and wise as their conquests on the battle-fields of Mexico were splendid and glorious.

#### CONCURRENT POWER OF NATIONS AND OF THE STATES OF OUR UNION OVER DIVIDING NAVIGABLE WATERS.

SEC. 54. It is a principle of American public law, that where the middle of a navigable river, or lake, or bay, forms the dividing line of States, or an intangible line upon their waters, a concurrent jurisdiction, civil and criminal, arises over such waters to the States upon the opposite shores. It extends over the whole of the dividing waters, unless it was otherwise stipulated before the adoption of the Constitution of the Union by State compact, or since, by such compact, with the assent of Congress. (*Const. Missouri*, art. 9, § 2. *Const. Wis.* art. 9, § 1. 5 *Wheat.* 378. 3 *Dana's Ken. R.* 278, 279. *Code of Virg.* 1849, pp. 49, 50, 52—57. 1 *Stat. Ohio*,

62. 3 *N. Y. R. S.* 187, 188. *R. St. N. J.* 38, 39. 3 *U. S. St. L.* 546, § 2; p. 429, § 2; p. 289, § 2. 5 *Ib.* 742, § 3.)

The Supreme Court of the United States decided in *Handy's Lessee vs. Anthony*, (5 *Wheat.* 375, 379,) "that where a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream." In the case between the United States and the private claimants of the Pea Patch Island, in the Delaware River, (*Wallace's U. S. C. C. R. Ap.*) John Sergeant, referee, held that the States of Pennsylvania and New-Jersey, by their charters, extended only to low-water mark on the opposite sides of the Delaware; that the crown held the river, soil, fisheries, &c., and that the Declaration of American Independence changed the State line to the centre of the river, and gave the soil and jurisdiction of the eastern portion to New-Jersey, and of the western to Pennsylvania. That the exact division and partition was effected by a compact made and ratified in 1783 and 1785. By this compact concurrent jurisdiction was given to both States on the water. He held that the Pea Patch was within the territory of the State of Delaware, and that her cession vested the title in the United States.

The same principle is applicable to all cases among nations where their boundaries divide navigable waters. The line being incapable of sight and ready perception, a concurrent jurisdiction, of necessity, must exist on the dividing waters. The navigable rivers, bays and great lakes, divided by the boundaries of our republic and the British provinces and Mexico, are, by national comity and necessity, subject to such concurrent jurisdiction.

In all cases of such concurrent jurisdiction the State first arresting or prosecuting a party is, by comity, enti-

tled to proceed to final judgment; and that is a bar to any re-trial by any other State of our Union for the same cause or offence. (*Hox vs. Ohio*, 5 *How.* 435.)

The same rule, by national comity, should govern nations thus situated; as our States are municipal sovereignties.

FOREIGN OFFENDERS, PAUPERS, MINORS, &c.

SEC. 55. In the States of our Union, municipal sovereignty gives to them the power, by law, to exclude fugitive criminals from foreign nations, foreign paupers and aliens of offensive cast, except so far as such law may conflict with the national Constitution, or an act of Congress regulating the inter-state or international relation, or with a treaty of the republic. (7 *How.* 283. 11 *Pet.* 102. 14 *Ib.* 568, 569, ch. 7, § 29.) The State laws may provide for their removal from their territory, if deemed dangerous, or it may provide for trying and punishing offenders coming into the State for foreign offences, with a view to deter them from entering it. (*Ib.*) This power is subject, however, to the paramount extradition provisions of our national Constitution and of our treaties; which are the supreme law of the land. (*Ib.*)

If a man in one State of our Union shoots across a State line and intentionally kills a man in another State, or if he plans a felony in one State, and by agents and instrumentalities employed in another State causes a crime to be there committed, he is guilty of a crime in both States, if their laws so provide; and he may be punished by either of them, if he can be arrested within its territory, or if possession of the offender can be obtained by surrender, pursuant to the Constitution and acts of Congress, or a law of the State where the criminal is found. (Adams

*vs. The People*, 1 *Comst. N. Y. Ap. R.* 173.) It is a rule of the law of nations as well as of American law.

If a nation or State seize a criminal, by force, beyond its jurisdiction, within foreign territory, or within another State, or within a United States territory or the District of Columbia, it is an attack upon and a contempt of the sovereignty so invaded. And such sovereignty has the right to insist upon his being returned by the offending State or nation. This was done by President Taylor in the case of Rey, the Cuban fugitive criminal, who was, by force and fraud, carried from New-Orleans to Cuba by the management of the Spanish consul.

The public law of the States of our Union is to the same effect. Hence Congress, in providing for the execution of the constitutional provisions for extradition among the States, (art. 4, §§ 2, 3,) has extended this rule of public law to the District of Columbia and the territories of the Union. (1 *U. S. St. L.* 302. 2 *Ib.* 116, § 6.)

Congress, having power to regulate commerce and all intercourse with foreign nations, may, by law, exclude foreign criminals and paupers from the United States, or may authorize their extradition to their own countries, as Congress shall provide. (Kaine's case, decided by Judge Betts in the U. S. Dist. Court.)

#### HIGH SEAS.

SEC. 56. The question of the definition and true meaning of the term high seas often arises. Our courts have defined its meaning. In *United States vs. Smith*, (1 *Mason's C. C. R.* 147, 148,) it was decided by Judge Story that a vessel lying outside the bar of Newburyport harbor, but within three miles of the shore, was on the high seas; the court adds, "for it has never been doubted that the waters of the ocean, on the sea-coast, without

low-water mark, are the high seas." In *United States vs. Grush*, (4 *Ib.* 297—302,) it was decided that a vessel lying in the outer harbor of Boston, but *intra fauces terræ*, was not on the high seas; and that our act of Congress for punishing offences on board vessels upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel, &c., did not apply to such offences committed on board such vessel in the outer harbor of Boston; but that the State courts alone had jurisdiction of the crime so committed.

An American vessel in a foreign land-locked bay is not within the act, or upon the high seas. (*Ib.* 5 *Ib.* 290. 1 *U. S. St. L.* 113, §§ 6, 8, and note a; and p. 115, § 12.)

In the *United States vs. Wiltberger*, (5 *Wheat.* 76,) the Supreme Court of the United States decided that a crime committed on board an American vessel in the River Tigris, in China, thirty-five miles above its mouth, was not within the act of Congress, and not punishable under it.

We have given the leading principles of American and public law that govern extra-territorial transactions, and the effect to be given them in other nations and States, and in the next and other chapters we have considered other questions of American and public law. The doctrine is settled that by consent, and by national comity founded on it, foreign transactions are generally allowed full effect in the State where they are sought to be enforced.

As our States are municipal sovereignties, the law of nations applies to them, and, except so far as the Constitution of the United States has provided for extradition or other extra-territorial action of a State within the other States, a State statute is necessary to authorize any exer-

cise of authority within it, with the single exception of cases of concurrent jurisdiction over dividing waters.

#### CORPORATIONS.

SEC. 57. Where the title to the property of a foreign corporation has passed, by assignment duly perfected, to a receiver, appointed by a court of chancery of the State creating the corporation, for the benefit of its creditors, its property located in another State is not liable to attachment there for payment of a debt. (*Angell & Ames on Corporations*, 3d ed. 399. 9 *Paige's Oh. R.* 215.)

But where no assignment of the property exists, and the *lex loci* of a State allows it, an attachment or trustee process may seize the property of a foreign corporation, and subject it to the payment of its debts. (*Ang. & Am. on Corp.* 399. 9 *N. Hamp. R.* 394. 1 *Story's C. C. R.* 531.) The principle is that the proceeding is *in rem*, and jurisdiction attaches to the property, and the *lex loci* may regulate proceedings to appropriate it to pay a debt sued for.

In the national courts this rule is enforced without reference to the State law where the proceedings are had. (1 *Story's C. C. R.* 531. *Ang. & Am. on Corp.* 253, 254, 399, 400.)

Foreign agents of corporations as well as domestic, in the residence of such bodies, may act and contract within the scope of their authority, and represent, bind and appear for corporations, unless restricted by the law of the place of contract or of action; and such authority may be express, or it may be implied from the custom and usage of a corporation. (1 *Pet. R.* 69, 70. 9 *Ib.* 565. *Ang. & Am. on Corp.* 187.) The same rule prevails as in case of natural persons as to the forms and mode of conferring such authority on private persons. (*Ib.*)

## LIS PENDENS IN FOREIGN COURTS.

SEC. 58. A suit between the same parties pending in a foreign country cannot be pleaded in abatement, and a judgment in one such suit does not merge the cause of action, and cannot be pleaded in bar to the continuance of the other before a foreign tribunal. (2 *Curtis' C. C. R.* 559—561, and cases there cited.)

The States of our Union stand upon the same principles, so far as the pendency of two suits at the same time in different States is concerned. But, as the Constitution of the United States declares that full faith and credit shall be given to all judicial proceedings, decrees and judgments of each of our States, in every other State of the Union, where the State tribunal had personal jurisdiction of the parties or of the thing proceeded against *in rem*, a trial and judgment of one of two actions, pending in courts of different States of our Union, would be final in the courts of both, and would merge the cause of action. (2 *Curtis' C. C. R.* 560, 561. 19 *Johns. R.* 162. 8 *Ib.* 173. 4 *Watts & Serg.* 314.)

## EXTRA-TERRITORIAL JURISDICTION OF NATIONS.

SEC. 59. So long as a man remains a citizen or subject of any nation or king, the right remains in the legislature of his country, or in its law-making power, to regulate the conduct of such citizen or subject within its territory, and its maritime curtilage, on the high seas, on desert islands, in all places where there is no local civilized government, and in foreign countries, to the extent that it shall think proper, subject to such limitations as may be compatible with national comity and treaty stipulations. It is also subject to the constitutional limitation that no



person in the United States shall be twice tried for the same offence, and to the provisions of the Constitution of the United States. It is obviously an inherent power in all nations to regulate their foreign relations, and the acts and omissions of their citizens or subjects everywhere, so far as they may be deemed to affect international relations, of which each government must judge for itself.

It follows from these principles, that if military or naval expeditions are got up within any country against any foreign nation or people, in violation of the *lex loci* or the law of nations, such illegal parties may be arrested in any of the places before mentioned, and even in the invaded country, if the latter will allow it, as it seems an act of justice in the nation where such invasion was wrongfully organized to remove the invaders which it has permitted, by want of care, to escape and carry war into a foreign State. This seems in accordance with the golden rule, truly declared by President Buchanan the basis of the law of nations.

The manner in which and by whom these doctrines are to be carried into effect vary with the constitutions of different States.

#### FRAUD IN FOREIGN DOCUMENTS.

SEC. 60. In the *Amistad* case, the Supreme Court of the United States held, that foreign documents found on board a foreign private ship were *prima facie* evidence of the facts appearing by them, but that they might be proved to have been originally obtained by fraud, or to have been applied subsequently to a fraudulent or illegal use, and that when so proved, their sanctity and effect is destroyed. For, say the court, fraud will vitiate any, even the most solemn transactions, and an asserted title

to property, founded upon it, is utterly void. (15 *Pet.* 594.) This is a sound principle of the law of nations, as well as of municipal jurisprudence. It is well settled that all judgments of all courts may be proved to have been obtained by fraud, and that such proof destroys their effect and all rights claimed under them.

## CHAPTER V.

### AMERICAN LAW, AND THE LEADING PRINCIPLES OF THE PRIVATE INTERNATIONAL LAW OF THE UNITED STATES.

In this chapter we propose particularly to explain those principles of American public law that, with others illustrated in the residue of this work, form the great elementary doctrines and the basis of American polity and jurisprudence. Our system of government, national and State, is peculiar, and reposes on the self-evident truths of the Declaration of Independence.

American jurisprudence is original, and the systems of national and State law, and judicial administration, are the embodiment of new principles to ensure to the people self-government and perfect protection of life, liberty and property. The constitutions, national and State, national and State compacts, compacts among the States assented to by acts of Congress, relating to new States and the territories of the United States, are the declaratory evidence of American law. It is not a code of common or civil law, but its principles are the offshoots of American freedom and of our free institutions. Freedom of speech; free religion; a free press; freedom from attainders, confiscations, and judicial murders for pretended and imputed treasons, to gratify tyrants and oppressors; perfect protection of life, liberty and property against violation by government or individuals; freedom from being compelled to make a self-accusation, or from being tried more than once for the same offence, or in the absence of the

accused ; freedom from trials for pretended crimes without arrest on due proof ; freedom from outlawry and condemnation for contumacy ; freedom from cruel confiscations and punishments, unreasonable searches, and from excessive bail ; a permanent right to the writ of *habeas corpus*, the shield of personal liberty ; freedom from a State martial law declared by the executive, an oppressive instrument of despotism ; a practical and efficient right of self-government secured to the people ; the supremacy of the civil administration over the military and naval power, making industrial pursuits the great object of the people, and ensuring peace and national prosperity. These are the great and leading principles of American public law, which form the basis of our State and national polity and jurisprudence.

Our system is original, and by its elementary principles precludes such acts as the banishment of Aristides and Themistocles, the judicial murder of Socrates at Athens, and the murder of the Gracchi and like acts in ancient Rome, as well as in England, France and other modern European nations. It precludes inquisitions, bastilles, towers of London, and such like appurtenances of ecclesiastical and civil despotism, and ensures that no man shall be deprived in our republic of life, liberty or property, without due process of law, and a fair and open trial, of which he has due notice. It contrasts strikingly with all prior systems in its principles and in its results.

In England, the proceeding of outlawry against absent persons not served with process, puts a man, as Blackstone, in his *Commentaries*, expresses it, "out of the protection of the law, so that he is incapable to bring an action for redress of injuries ; and it is also," says he, "attended with a forfeiture of all one's goods and chattels to the king." Trial of absent criminals on the continent, not served with process, and perhaps in foreign countries, by

a proceeding for contumacy, and thus trying *ex parte*, and condemning the accused unheard, partakes of the injustice of outlawry, and they are both acts of wanton despotism under the forms of law.

Our American law, original, just and beautiful, ordains that no one shall suffer in person or property without due process of law served, and with a fair, open and impartial trial. The English Magna Charta was not the original of our American law, for outlawry, attainders, judicial assassinations and despotic and unjust confiscations and imprisonments were practised there for centuries after the barons at Runnymede compelled King John to allow them a trial by their peers, though they trampled habitually on all law and justice among their vassals.

Our forefathers seem to have been guided by the still voice of celestial wisdom in planting themselves in America, in forming a Christian commonwealth, with Jehovah for its Law-Giver; in the time and manner of separating from the mother country, and in the organization of our present national and State government on the basis of popular sovereignty with such constitutions of government.

Portions of the common and civil law, as modified by British colonial, by French, by Spanish and Dutch law, were incorporated in our respective systems of State law, but most of the great elementary principles of American law were original.

In this and the other chapters, under appropriate heads, we have endeavored to explain American public law, and its effect on the municipal law of the States, of which it is the basis, and the private international law of the United States.

SEC. 1. The States forming our Union are separate municipal sovereignties, united by a Constitution that confers specific though national powers upon the general

government, and restrains and takes away certain of the attributes of sovereignty before possessed by the States, or by the people of them respectively. In the House of Representatives popular representation prevails, by members elected by the people for two years, who are twenty-five years of age, and who have been seven years citizens of the United States. Representatives and direct taxes are apportioned among all the States of the Union, according to their respective numbers, which is to be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. This is a national and popular representation. In the Senate each State has two senators, who are chosen by the legislature thereof for six years, and each senator has one vote. Senators, to be eligible, must be thirty years of age, and must have been for nine years citizens of the United States, and inhabitants of the States respectively appointing them. The Senate represents the States in their sovereignty. Hence, the House has the power to impeach, and the Senate to try the impeachment of the President, Vice-President and all civil officers of the Union, for treason, bribery and other high crimes and misdemeanors. (*Const. U. S.* art. 1, §§ 2, 3; art. 2, § 4.)

Hence, the President, a native-born citizen, or a citizen at the adoption of the Constitution, and thirty-five years of age, elected for four years, and charged with the executive power of the Union, may, with the advice and consent of the Senate, make treaties, if two-thirds of the senators present concur. And he may, with the like advice and consent of the Senate, nominate and appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not by the Constitution otherwise provided for, and

which shall be established by law, Congress having power by law to vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law or in the heads of departments. (*Const. U. S.* art. 2, §§ 1, 2.) In case of vacancies happening during the recess of the Senate, the President is empowered to grant commissions that expire at the end of the next session of Congress. (*Ib.* § 2.)

All the legislative power of the Union is vested in Congress, (*Ib.* § 1,) and all the executive powers in the President. (*Ib.* art. 2, § 1.) But art. 1 § 7, provides that the President must sign all bills approved by him; but if he disapproves of any bill he must return it, with his objections, to the house where it originated. These being entered at large on the journal, the house must proceed to consider the objections and vote on the bill; and if two-thirds of that house vote to pass the bill, it must be sent, with the objections, to the other house, and if voted for by two-thirds of that house, it becomes a law. In such case the votes are taken by yeas and nays, and the names of each person voting for and against the bill must be entered on the journal of each house. If the President fail to return a bill within ten days (Sundays excepted) after its presentation to him, or shall not return the act with objections, it becomes a law, unless Congress adjourns, and prevents its return within ten days.

The Vice-President presides in the Senate, but has no vote unless the senators are equally divided.

#### TRIAL OF IMPEACHMENTS.

In case of impeachment of the President, the Chief Justice of the Supreme Court of the United States presides, and in all cases the votes of two-thirds of the senators present is necessary to a conviction; and the judg-

ment on all impeachments is simply removal from office, and disqualification to hold any office of honor, trust or profit under the United States; but the convicted party remains subject to trial and punishment according to law for any crime committed. (*Ib.* art. 1, § 3.)

In case of the death, removal or inability of the President to act, his powers pass to the Vice-President; and in case of the inability of both to act, Congress has enacted that the President of the Senate *pro tempore*, and if there be none, then the Speaker of the House of Representatives, for the time being, shall act as President of the United States until such disability be removed or a President shall be elected. (*Ib.* art. 2, § 2. 1 *U. S. St. L.* 240, § 9.)

The President is commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States. (*Const. U. S.* art. 2, § 2.)

Our government proceeds on the basis that all power originally resides in the people, and that all rightful government is the manifestation of the will of the citizens to be governed, or, rather, to be protected, by their deputed agents, the officers of State, executive, legislative and judicial. Hence, limited powers are given to each department, and the limitations are practically enforced by the action of each upon the other. The President can impede, by his veto, the action of Congress, though it is vested with the national legislative power, and the Senate can control the action of the executive in making treaties and appointing of high officers of the nation, though the Constitution confers on the President the executive authority of the republic. The Supreme Court of the United States is vested with the power to annul and make void any act of Congress or of any State legislature adjudged to violate a right secured by the Constitution



of the Union, or by a treaty or act of Congress made in pursuance of it.

The general municipal authority resides in the States respectively and their people; and they, by the Constitution of the Union, have conferred specific national powers on Congress and the national government. (*Federalist*, No. 45.) The Supreme Court of the Union, and all State courts, are bound to annul any act of Congress or State law that violates this constitutional distribution of the powers of government.

Again, the States having complete and independent municipal governments, each with a governor, legislature, courts, militia, arsenals, funds and power of taxation, are instinct with life and capable of self-preservation.

The national government possesses a like complete and independent organization, and has, within itself, a self-supporting power to the full extent of the national authority. To ensure harmony and the paramount authority of the Union in cases of conflict, the Constitution of the United States, by article 4, declares that the Constitution, and laws of the United States made in pursuance of it, and all treaties made, or to be made, under the authority of the United States, shall be the supreme law of the land, and that the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

Thus our great charter of liberty, framed by Washington, Franklin, Madison, Hamilton and their noble compatriots, has wisely divided the municipal from national authority; secured the independent action of each, and endowed each with the capacity of self-preservation. Absolute power, safe only in the hands of the High and Holy One who inhabiteth eternity, is excluded from every department, State and national, in our republic. And the great mass of governmental powers, those that the people

feel, such as the laws that regulate the security of persons and property, are left to the people of each State, and the action of the respective legislatures and the State tribunals. Those best knowing what laws they want, make them in the respective States, and the other States and the national government ordinarily have no control or right to interfere. Hence, the great satisfaction and happiness of the people of our republic. They literally govern themselves, and who can complain of his own government?

Experience has proved this since 1789, the year of the organization of our Union under the national Constitution—a system of government the best the world has yet seen.

#### POWER OF CONGRESS.

SEC. 2. The national Constitution (art. 1, § 8) confers on Congress exclusive power to pass all laws deemed necessary for raising money for any national object by tax, duty, impost, excise or loan; to declare war; to coin money; to raise and disband armies; to naturalize aliens by uniform laws, and to exercise other national powers specified in the Constitution.

#### COMMERCE.

SEC. 3. Congress has exclusive power to regulate commerce with foreign nations, among the States of our Union and with the Indian tribes. (Art. 1, § 8.) This authority is plenary, and confers on Congress the power of regulating by law all commerce and intercourse by land or water, by ships or otherwise, with foreign nations, and from State to State, and with the Indian tribes. It includes all navigation of vessels sailing from one American port of any State to another port in the same State with a United States license, or to any other port, and all

foreign intercourse to and from our ports. (*Waring vs. Clark*, 5 *How.* 465. 1 *U. S. St. L.* 304. Passenger cases, 7 *How.* 394, 395, 421. License cases, 5 *Ib.* 574, 575. 9 *U. S. St. L.* 635. *Brown vs. Maryland*, 12 *Wheat.* 419. *Gibbons vs. Ogden*, 9 *Ib.* 196, 202—215. 2 *Pet.* 102. 11 *Ib.* 102, 144. 2 *Story Const.* §§ 505—515. 15 *Pet.* 504—506. 5 *U. S. St. L.* 113, 304, 627, 726. 2 *Ib.* 192, 193, 451, n. a. 14 *Pet.* 570. 9 *How.* 560—567. 3 *Ib.* 229. 12 *Pet.* 78, c. 3. 10 *How.* 557—559. 12 *Ib.* 443. *Wheeling Bridge case*, 13 *Ib.* 519. 18 *Ib.* 429. 21 *Ib.* 7.)

By virtue of this power, Congress can properly pass laws to provide for the safety of passengers and property on board vessels sailing to and from our ports, or under a United States license, either in coasting, lake or foreign commerce, and to regulate the rights and duties of the owners of American ships, of freighters thereon, and of all persons sailing therein or connected therewith. This power extends to all the public navigable waters of our republic. (12 *How.* 443.)

Under this power, Congress passed an act, in 1851, limiting the liabilities of ship-owners as common carriers. Under it embargo and non-importation laws have been passed as well as acts regulating steamboats. The power is co-extensive with the subject.

The State police, sanitary, quarantine and inspection laws, and laws regulating wharves and ferries, are not regulations of commerce, but if they conflict with any act of Congress, they would so far be void. (3 *Law Mag.* 408, 409. 9 *Wheat.* 203—205, and cases above cited.)

#### INTERNAL STATE COMMERCE.

SEC. 4. The purely internal commerce of a State is not carried on in vessels licensed by the United States,

but in canal-boats, cars, by teams, carriages and otherwise within a State. Canals, railways, roads, and the municipal navigable waters of a State, are the avenues of State internal commerce. Lakes Seneca, Cayuga, George, and other like navigable waters, and the upper parts of navigable rivers above the natural national navigation, form part of the field of State internal commerce. (See §§ 3—5. 14 *How.* 80, 568.) The regulation of fisheries within a State belongs to it. (18 *How.* 74.)

The States are municipal sovereignties, and may pass, subject to constitutional limitations, all needful sanitary and police laws, and such as are deemed necessary for the regulation of the purely internal commerce of the States. (*Ib.* 4 *Sandf. S. C. R.* 508, 509.)

A State, under its police powers, may pass laws to compel its residents to respect the rights of owners of slaves, or to prevent the emigration into it of free negroes or slaves, subject to constitutional limitations and to the law of comity.

In *Hicks vs. Williams*, (17 *Barb. R.* 523,) it was held, by the Supreme Court of New-York, that a canal-boat, though it may be towed to and from New-York on the Hudson River, from Troy and Albany, ports of delivery, is not within the Registry Act of Congress, requiring the enrolment and registry of all vessels of the United States. The same doctrine has been applied to scows and canal-boats, though running from port to port on a river in the same State. (5 *Hill*, 34. 17 *Barb.* 529. 5 *Wend.* 564.)

The distinction between foreign commerce and internal trade is well stated by Chief Justice Taney, in the license cases. (5 *How.* 574, 575.) He says, this question came directly before the court for the first time, in the case of *Brown vs. Maryland*, 12 *Wheat.* 419; and the court there held, that an article authorized by the law of Congress to

be imported, continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package or vessel in which it was imported; that the right given to import necessarily carried with it a right to sell the imported article in the form and shape in which it was imported, and that no State, either by direct assessment, or by requiring a license from the importer before he is permitted to sell, could impose any burden upon him or the property beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity passed from his hands into the hands of a purchaser, it ceased to be an import or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State like other property. And he further added, that this was the distinction laid down in *Brown vs. Maryland*, between foreign commerce which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control.

The liquor cases decided by the Supreme Court of the United States, (5 *How.* 504, 586, 588,) settled that each State of our Union had exclusive power to regulate its domestic commerce, contracts, the transmission of estates real and personal, and to act upon all internal matters which relate to its moral and political welfare, and that over these subjects the national government had no power. That the license laws of the three States in question in those cases were police regulations, directing how liquors should be sold in them respectively, and that they were not regulations of commerce, but simply internal ones. That our States, by virtue of their police powers, may exclude merchandise liable to communicate disease from

a port, and may remove any thing prejudicial to health or morals, and that in extreme cases such dangerous property might, by State authority, be thrown into the sea. That this is by virtue of a power of self-preservation, which, of necessity, belongs to every community. That, by the settled construction of every regulation of commerce, under the sanction of its general laws, no person can introduce into a community malignant diseases, or any thing which contaminates its morals or endangers its safety. That all general regulations are subject to these principles. That as these State license laws regulated the sale of liquors, not being an import in the hands of the importer, they were valid.

In *The People vs. Wynchamer*, the New-York Court of Appeals, in 1856, decided that the Prohibitory Liquor law of that State was unconstitutional and void, as it in effect destroyed all property in liquors by mere legislation, and without forfeiture by due process of law. (12 *How. N. Y. R.* 242.)

It has been held, in the Supreme Court of New-York, that a canal-boat or scow is not subject to the national laws for registering and enrolling vessels of the United States, though it might run from one port of delivery to another on a public navigable river, or be towed thereon from one to another such port. (17 *Barb. R.* 523, and cases there cited.)

It would seem that such craft and other small vessels, devoted mainly and substantially to the internal commerce of a State, are not subjects of national registry, and subject only to the municipal laws of the States, unless they impede, in the judgment of Congress, the national commerce on the public navigable waters of the Union. In such case Congress might regulate to prevent impediment, as its jurisdiction over such waters is plenary for all national objects.

## WHARVES, WHARFAGE.

Pursuant to a State law a municipal corporation may charge wharfage to any vessels, foreign or domestic, as a compensation for the use of wharves to accommodate the lading and unlading of merchandise and articles of commerce ; and such charge is not a violation of the constitutional power of Congress over commerce, and the levying and collecting duties on commercial commodities. (2 *Louis. An. R.* 1847, p. 540.) It is a police regulation.

In the case of *Bowman's Devises vs. Wathen et al.* (3 *McLean's C. C. R.* 382,) the United States Circuit Court, Mr. Justice McLean presiding, held that the riparian right upon a navigable river, like the Ohio, extended generally only to high-water mark ; but that it might, when allowed by the municipal law of the State, extend beyond this limit for certain purposes, such as the erection of wharves and other structures for the convenience of commerce, and which do not obstruct the navigation of the river.

This right of wharving, pursuant to a State law, is a mere appurtenant right to the riparian land, and, in its nature, incapable of separation from it. (1 *Amer. Railway Cases, with Notes by Smith & Bates*, 356.)

Any State or government may appoint harbor-masters, and by penalties compel masters of vessels to occupy the berths appointed by him. It flows from the sovereignty, and is a police regulation. (7 *Cow. R.* 349, 351.)

In the case of the *Commonwealth vs. Alger*, (7 *Cushing's R.* 53, 98,) the Supreme Court of Massachusetts decided, that in rivers not navigable by the common law rule the public have—1. The right of passage with boats, rafts and other vessels, adapted to the use of such waters. 2. The right to have these rivers kept open and free for the migratory fish, such as salmon, shad and alewives, to



pass from the sea to the ponds and head-waters to cast their spawn. That at common law, where an owner's land is bounded on tide-water, his title extends only to ordinary high-water mark, (p. 778,) for all land beyond belonged to the king of common right, unless appropriated by grant or prescription, which presupposes a grant.

That by virtue of its municipal sovereignty the State has a right to regulate and dispose of the sea-shores, and tide-waters and all lands under them, and all public rights connected with them, including the regulation of all wharves and erections below ordinary high-water mark.

In *Lansing vs. Smith*, (4 *Wend.* 21,) the New-York Court of Errors held, that where the tide ebbs and flows below ordinary high-water mark, the State owns the soil under water in all rivers, bays and harbors, and has the exclusive right to authorize and to regulate wharves, piers, wharfage, and all erections upon the soil in the beds of rivers, bays, &c. This right is, however, subject to the paramount common American right of free navigation by all vessels sailing under a United States license, or to and from foreign countries. The New-York Court of Appeals again held the same. (2 *Seld.* 522.)

This State right is applicable to the navigable waters of our great lakes, and nationally navigable rivers and maritime curtilages.

No State has, by our public law, any authority to convey to any one a right to erect wharves, or any thing that shall impair the commercial facilities of any of our ports of entry or delivery; though the States of our Union, by virtue of municipal sovereignty, may regulate piers, wharves and ferries, in aid of commerce and intercourse. (7 *Cush. R.* 53. 4 *Wend.* 21. 5 *Gillm.* 351, and cases cited in this sec. and in ch. 6.)

If any wharf or erection below ordinary high-water mark is found to impede commerce, and infringe injuri-



ously upon national public navigable waters, a State may pass laws for their removal without compensation, if erected without authority from the State, and with compensation, by virtue of eminent domain, if the State authorized them. (*Ib.*)

In *Fitch vs. Livingston*, (4 *Sandf. S. C. R.* 492,) it was held by the Superior Court of New-York, that a steam-propeller, sailing under a United States license as a coasting vessel from Philadelphia for Albany, was bound, while navigating the Hudson River, to carry two lights at night as required by the laws of New-York, though the act of Congress directs that one or more signal lights shall be displayed by such a vessel at night. That the State law was not in conflict with the act of Congress, but was a State police regulation, and that under the State law the coasting steamer might be attached and compelled to pay the damages to another vessel arising from the not carrying such two lights.

The Supreme Court of the United States have held, that our States may regulate the taking of fish in the public navigable waters, such as Chesapeake Bay, within their limits; and may legally pass laws confiscating fishing vessels for violating the State regulations. (18 *How.* 74, 75, and ch. 6, §§ 7, 8.) The same court has affirmed the above doctrine as to wharves. (17 *Ib.* 426.)

#### PILOTAGE AND SALVAGE.

In *Hobart vs. Drohan*, (10 *Pet.* 108, 117,) the Supreme Court of the United States decided, that, so far as Congress has adopted the State laws as to pilotage, or as the acts of Congress were not in conflict with the State pilot laws, the State law furnished the rule as to the rights and duties of the pilots of the several States. But that no salvage power had been transferred to the States; and

that where pilots out of the line of their duty saved property on tide-water, the admiralty had jurisdiction to allow them salvage in the ordinary character of salvors.

The court also held, that suits for pilotage on the high seas, and on waters navigable from the sea, as far as the tide ebbs and flows, are within the admiralty and maritime jurisdiction of the United States. The service is strictly maritime, and falls within the principles already established by this court in the case of the *Thomas Jefferson*, (10 *Wheat.* 428,) and *Peyroux vs. Howard*, (6 *Pet.* 682. 12 *How.* 299.)

Seamen as well as pilots, the court said, saving a ship out of the line of their duty, are entitled as salvors. (*Ib.*)

In suits for pilotage the State courts may have concurrent jurisdiction with the national courts, unless acts of Congress shall otherwise provide. (*Ib.*)

The Supreme Court of the Union has decided that State pilotage laws are valid, unless they shall conflict with acts of Congress. That Congress has power to pass laws concerning the whole matter, and excluding State laws. (*Ib.*)

In the case of the *Genesee Chief*, the Supreme Court of the United States decided that all public navigable waters of our republic were subject to the legislation of Congress, and to the admiralty and maritime power of the national courts. (12 *How.* 443.) The old tidal distinction, borrowed from foreign decisions, seems to have been finally repudiated by that court for the most conclusive reasons. Our great fresh-water seas, and rivers Mississippi and St. Lawrence, with other great navigable rivers, give rise here to the legal distinction of nationally navigable waters, as contra-distinguished from municipally navigable waters. All of our great and navigable lakes and their straits, and all nationally navigable rivers, belong to the people of the United States, and are of right

free to the navigation of all vessels sailing under a United States license. These are subject to national legislation for national objects. (18 *How.* 429, 436.)

#### NAVIGABLE WATERS.

SEC. 5. It is a well-settled principle of American public law, that the public navigable rivers, lakes, bays, maritime curtilage and other like waters within the United States, are free, of natural right, to all the people of our republic, without toll, charge or impediment. By the ordinance of 1787, an act declaratory of American law, in article 4, it was enacted by the Congress of the confederation that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory (northwest of the Ohio) as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor. August 7, 1789, this ordinance was confirmed by Congress. (1 *U. S. St. L.* 50—52, and n.)

The same rule of public law has been declared by Congress in reference to the Missouri and Mississippi rivers, and their navigable tributaries, and to the navigable rivers flowing into the Gulf of Mexico, and to those of California. (2 *Ib.* 703, 747. 3 *Ib.* 546, 547, § 2; 349, § 4. 5 *Ib.* 743. 2 *Ib.* 642, § 3. *Const. Wis.* art. 9, § 1. *Ante*, c. 1, § 15. Act. Ad. Calf. 9 *U. S. St. L.* 452. 3 *How.* 220, 221.)

The great lakes, bays, and our 5,120 miles of sea coasts, are subject to this law of freedom. (*Ib.*)

The commercial power of Congress is plenary over all commerce affecting two or more States, and over all commerce or intercourse of persons and things carried on

by American vessels, sailing with a United States license, to and from any American port of entry or delivery, or elsewhere, and to foreign vessels coasting to or going from our ports. Congress has the same commercial power over the great lakes as over the oceans. (12 *How.* 443.) Hence, by act of Congress, the admiralty jurisdiction of the federal courts has been extended over them. (5 *U. S. St. L.* 726.) By this act of 26th of February, 1845, it was enacted that the district courts of the United States should have jurisdiction in matters of contract and tort arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories upon the lakes, and navigable waters connecting said lakes, as now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide-waters within the admiralty and maritime jurisdiction of the United States.

The commercial and admiralty jurisdiction of the federal courts extend equally to the great lakes, to the Gulf of Mexico and to the Atlantic and Pacific oceans. The constitutional power of Congress over the seas and great lakes, and their maritime curtilage, is the same, and all are free to all the people of the United States. (See *Genesee Chief*, 12 *How.* 443. 14 *Ib.* 532. 13 *Ib.* 101, 283. 5 *Ib.* 115, 441.)

In *Gould vs. Hudson R. R. Co.*, (12 *Barb.* 628,) it was held, that the Hudson River, where the tide ebbs and flows, is a public navigable river; that the riparian owners of lands bounded on the sea or such a river extends only to ordinary high-water mark; that the land below high-water mark belongs in England to the crown

and here to the State; that all such navigable rivers are public highways, upon which all persons have a right to navigate in pursuit of any lawful business; that no person has a right to obstruct the navigation by any permanent erection, so as to prevent the passage of vessels up and down the river; that the State has a right to construct or authorize the construction of wharves, piers, breakwaters and other embankments, which tend to improve the navigation or do not interfere therewith; that the right of fishing in such waters is a common right, subject, however, to the use of the waters as a highway, and to the regulations prescribed by the supreme power. The court held, that the rail-road embankment from one point to another in the Hudson River, cutting off the plaintiff from access from his riparian land (thus inclosed) by water to the river channel, pursuant to the charter of defendants, was made on State land under the river below ordinary high-water mark, and was lawfully made, without compensating the riparian owner. That his loss was *damnum absque injuria*.

This case went to the Court of Appeals of New-York, and the judgment was affirmed.

The same doctrine has been laid down by the Supreme Court of Massachusetts. (1 *Am. Railway Cases*, S. & B. notes, 546.)

The same was held in *Hollister vs. Union Co.* (9 *Conn. R.* 430.)

In *Eldridge vs. Cowell*, (4 *California R.* 80, 87, 88,) the Supreme Court of that State held, that the legislature had power to grant to private persons land under the water of San Francisco Bay, on the shore, to be filled and wharved for commercial purposes, and that this was in aid of commerce, and not an obstruction to navigation; and that as the city map, and the grant of a water-lot pursuant to it, was made to defendant, and confirmed by

the legislature, prior to the purchase by plaintiff of his lot in rear, he took no riparian rights, though his lot originally reached the shore ; and that if the filling destroyed the navigation of the bay, the plaintiff had no right to complain of it ; and that, as to the public, it was not a nuisance ; and if a purpresture destructive to navigation, or seriously affecting the public welfare, would subject the defendant to a prosecution by the people, and would not sustain an action by the plaintiff.

In the case of the Corporation of Sacramento *vs.* Steamers, (4 *Ib.* 41—45,) where the bank fronting the city was dedicated to the public, it was held, that as no private persons could wharf, and the wharfing was under city control, that the city might, by ordinance, fix rates of wharfage and collect them. The city had doubtless been empowered by law to regulate the wharves and the river navigation, so as to facilitate commerce.

*Hecker vs. New-York Balance Dock Company.* (13 *How. N. Y. R.* 549—552.) In this case it was held that a floating dock erected in a slip of the East River, New-York, permanently fixed, without authority of the legislature, and injurious to riparian owners, was a nuisance.

The court say : “ *The assumption of a franchise or exclusive privilege*, or, in other words, the setting up of a *monopoly*, unless sanctioned by the legislature, is, in law, a nuisance. The recent case of the Ninth Avenue Railroad, (3 *Abbott*, 262,) decided at General Term, is a direct authority to that effect.” (13 *How.* p. 551.)

In *Penniman vs. The New-York Balance Company*, (*Ib.* 40—42,) it was held, that a large floating dry-dock in a basin on the East River side of New-York, not authorized by statute of the State, is a nuisance, if injurious to riparian adjacent proprietors.

In navigable waters, great lakes and maritime curtilage,

harbors and navigable rivers, the right of a citizen is one of free passage with vessels of commerce or pleasure, while those within the territory of a State are subject to improvement by its legislature for commercial and useful objects, with the limitation that no such work shall substantially impede or obstruct any American citizen in the free navigation of all nationally navigable waters, whether great fresh-water lakes, navigable rivers, lake and sea maritime harbors and curtilage. This rule gives no right of permanent appropriation of public waters that are nationally navigable by floating warehouses or other structures, for the power to judge of their necessity and propriety, as commercial or quarantine aids, belongs exclusively to the State legislatures respectively.

In *Commonwealth vs. New-Bedford Bridge*, (2 *Gray's Mass. R.* 347—349, 352,) the Supreme Court of Massachusetts held, that a State could grant bridges across navigable rivers, with suitable draws, if not repugnant to the regulations of Congress; that the grantee of a franchise, the corporation, is bound to carry the act into effect, by acceptance of the charter; that the grantee must make draws, as directed by the charter, to accommodate the passage of vessels, or the corporation might be indicted for nuisance.

A State legislature has power to cause draw-bridges over navigable coves, bays and inlets, or piers in navigable rivers, provided the public navigation of the rivers and bays is not impeded. (5 *Selden*, 579.)

The Supreme Court of the United States, in *Pennsylvania vs. The Wheeling Bridge Companies*, in 1852, decided that a State owning public works likely to suffer irreparable injury by a bridge across a naturally navigable river, might file a bill in equity in the said Supreme Court for a removal of the nuisance, and for a perpetual injunction; that the national constitution had adopted the equity system of the High Court of Chancery of England,



and that our act of Congress authorized its application to such a case. In this case the bridge across the Ohio, at Wheeling, was about ninety-two feet high above low-water mark, and one thousand and ten feet from pier to pier, and steamers with sixty-foot chimneys could ordinarily pass under it freely, except in unusual floods; but seven or eight steamers running from Cincinnati to Pittsburg, with chimneys from seventy to eighty-five feet high, could not pass under the bridge in ordinary high water, and were thus obstructed in navigating the Ohio for a few days in every year. It appeared that by State compact, and by our public law, the Ohio at Wheeling was a public navigable river, and the court held that to and from Pittsburg its navigation was free to all the people of the United States as a common American right; that the bridge obstructed that navigation; that the State of Pennsylvania was injured in her public works in such a manner as to entitle her to bring the suit and to the relief prayed. And the court held the State laws authorizing the companies, defendants, to erect the bridge, were illegal and void, and that the nuisance should be abated by raising the bridge so as to remove the obstruction, or that it be taken down. (13 *How.* 519.) The court seemed to think that a draw-bridge might be lawful if over still water, provided it was so constructed as not to obstruct steamers or vessels sailing on a natural navigable river.

According to the doctrines of this case, all naturally navigable waters of the United States are free of common right to all the people of the Union. It forms one of the privileges of American citizenship, and imparts freedom to all natural navigable waters of the republic.

Chief Justice Taney held, in the Wheeling Bridge case, that there was no difference in the rights of navigation between the rivers and bays of the Atlantic States and those of the West. That the old and new States in that



respect stood upon an equal footing. That it had been so decided by that court, in *Pollard vs. Hagen*, 3 *How.* 212, and in other subsequent cases. The Chief Justice dissented from the decree, on the ground that Congress had not, in his opinion, conferred on the court the necessary jurisdiction. An associate dissented for a different reason. The court heard a second argument as to allowing a draw to be put in the bridge, but decided against it substantially. In this case Chancellor Walworth was a commissioner, and made an able report to the court, on which it was argued. The case was carefully considered, and settled the law. The *Genesee Chief* case sustains the principle on which this decision was made. (12 *How. U. S. R.* 443.)

In the *Wheeling Bridge* case, Congress, after the first decree, passed an act making the bridge a post route, and declaring that the corporation might "maintain their bridges at their present site and elevation," and requiring all vessels and steamers to conform to said bridge. (18 *How. U. S. R.* 429, 436.) On motion to enforce the former decree to abate or lower the bridge, by attachment, a majority of the court refused the attachment, on the ground that the defendants might reconstruct it under the act of Congress, and the motion for an attachment was one resting on discretion. The court seem to hold that Congress has power to judge and decide by legislation what is and what is not an obstruction to national navigation under the power to regulate commerce. That Congress has not power to annul a decree of the court affecting private rights, but may legalize bridges across nationally navigable waters, erected by State authority.

In the case of *Silliman vs. The Hudson River Bridge Company*, the Circuit Court of the United States for New-York, in 1857, granted an injunction against the erection of the Albany Bridge across the Hudson River, until the

hearing; and in the opinion, Mr. Justice Nelson asserted the great importance of preserving the nationally navigable waters free from obstruction by bridges or other erections by State authority. He justly estimated the great importance of the national right of free navigation of the Hudson and all other like waters. He truly declared, that the basis of the right was the Constitution of the United States and acts of Congress.

In truth the right of free, unobstructed navigation of all nationally navigable waters of the United States, without toll or substantial impediment, is based on a fundamental principle of American law. It was devised by the wisdom of our patriot fathers and statesmen to deliver the internal commerce of the Union from State regulation, and make all the waters of the republic necessary to national intercourse and trade subject to the paramount authority of Congress, the guardian of national rights and prosperity.

In the case of *Georgetown vs. Alexandria Canal Company*, (12 *Pet.* 94—100,) it was decided by the Supreme Court of the United States that, pursuant to an act of Congress, an aqueduct could lawfully be made across the Potomac at Georgetown, supported by piers, but that if the company exceeded its legal authority and obstructed the Potomac thereby, that, as the river was a navigable one and part of the *jus publicum*, any such obstruction would be in law a public nuisance.

The court also held, that a national court of equity might take jurisdiction of a public nuisance at the instance of a private person in danger of suffering a special injury, for which no adequate remedy at law could be had. But it was held that a city corporation had no such right as representing the people of the city.

Daniel Webster, who has won the title of the Expounder of the American Constitution, was of opinion that Congress

had a right, and that it was its duty to buy out the stock of the Louisville and Portland Canal Company, which passes steamers and vessels around the falls of the Ohio River, and to make the passage through it free. He considered the Ohio a national river, and that the British principle of the ebb and flow of the tides fixing the navigability of such rivers as the Thames, Severn and Trent, has no application to American rivers, which were in fact navigable by steamers, and had important ports far above tide-water, and more than a thousand miles from the ocean. (4 *Webster's W.* 248, 249.)

In the case of the *Genesee Chief*, (12 *How.* 443,) the Supreme Court of the United States held, that their admiralty powers extended over all public navigable waters of our Union, whether they had any tides or not. Chief Justice Taney said, that our country had thousands of miles of public navigable waters, including lakes and rivers, in which there is no tide, and the court affirmed the validity of the act of Congress extending the admiralty jurisdiction to them.

In *Spooner vs. McCornell*, (1 *McLean's C. C. R.* 351—353,) it was held, that in the Northwest Territory the ordinance of 1787, by compact, deprived the States formed out of that territory of the power to obstruct any of its navigable rivers by any State law; but that such States might legally pass laws authorizing corporations to improve their navigation, by locks and dams, or otherwise; and to charge tolls for the use of such improved navigation.

In the case of the *United States vs. The New-Bedford Bridge*, (1 *Wood. & Minot's C. C. R.* 401, 412, 415, 418, 419,) it was held by Justice Woodbury, at a Circuit Court, that the proprietors of a bridge over navigable waters, erected pursuant to a State law, cannot be punished criminally in the courts of the United States unless an act of

Congress shall have declared it a crime, and conferred on a national court jurisdiction of the offence. He held that such erection, though authorized by a State law, would be illegal, if in conflict with an act of Congress regulating commerce, or with a treaty.

The court also held, (419,) that the power to regulate commerce abroad and between the States, conferred on Congress, authorizes it to keep open and free all navigable streams, from the ocean to the highest ports of delivery or entry, if not higher; and to protect the intercourse between two or more States, on all our tide-waters. (2 *Gall.* 398. 3 *How.* 230. *Gibbons vs. Ogden*, 9 *Wheat.* 1. *New-York vs. Milne*, 11 *Pet.* 102, 135. *Angell on Tide-Waters*, 50.) That Congress might remove unauthorized obstructions, or punish them, by acts of Congress; and that it might punish injuries on land, if they tend to interfere with foreign commerce and navigation, or navigation between different States, though mere admiralty powers may not extend above the sea. (*United States vs. Coombs*, 12 *Pet.* 72.)

In *Commonwealth vs. New-Bedford*, (2 *Gray's Mass. R.* 347,) it was held, that where a draw-bridge was allowed by an act of the legislature across navigable waters, it could not be indicted as a nuisance, if suitable draws were made agreeable to the act; and that an act authorizing a draw-bridge across navigable waters was not unconstitutional, provided its enactments did not interfere with the regulations of Congress on commerce. In this case the question arose on a prosecution by the Commonwealth, and its own law was a bar to the raising of the question of its constitutional power. (15 *Wend.* 130, 131.)

In the case of *O'Brien agst. The Norwich and W. R. R. Co.*, (17 *Conn. R.* 372,) it was held, that it was a nuisance for a rail-road to be constructed across the mouth of a

cove, an arm of the sea connecting with a public navigable river (Thames) long used for public navigable purposes, and that a bill would lie to enjoin such work at the instance of a person sustaining a special damage from it, an injury distinct from that done to the public at large, but that one of the public not sustaining a peculiar injury from the work could not file such bill and enjoin the company. (*S. C. 2 Am. R. R. Cas.* 93; and ch. 6, § 20.)

In *Lewis vs. Keeling*, (1 *N. Car. (Jones) Law R.* 306,) the Supreme Court of North Carolina decided, that in a navigable river the rights of navigation and fishing were common to all the citizens of the State, but that the former was paramount to the latter; that both exist as public rights, not as private rights depending on grant or riparian ownership. That the right of navigation is paramount because of its superior importance. That the ownership of the land on the river bank confers no right beyond ordinary high-water mark, and leaves the beach between high and low-water mark, and the water and soil under a navigable river, a public highway. That in the absence of a special grant from the State, all rights below ordinary high-water mark are common.

The Supreme Court of the United States, in *Smith vs. State of Maryland*, (18 *How. R.* 75, 76,) held that the State had power to make a law prohibiting certain modes of taking oysters in Chesapeake Bay, within the State, on pain of forfeiture and confiscation of the vessel used to violate the law; and that the soil below ordinary high-water mark was the property of the State, and was held for the use of its citizens, subject to the paramount right of national navigation, and to the admiralty jurisdiction of the national courts. The ownership and right of the citizens of Maryland to fish to the exclusion of other American citizens must, upon general principles, be con-

fined to a maritime curtilage of three miles from the shores of the Chesapeake. Beyond this line fishing is public to all American citizens. But the State had authority, according to this case, to pass laws to preserve oysters beyond its curtilage as well as within it.

In *Veazie and Young vs. Moore*, (14 *How.* 568, 571, 572,) it was decided that the legislature of Maine had the exclusive municipal authority over the Penobscot River from the falls above Bangor upward, as part of the internal navigation of that State, and might lawfully grant, by law, to a company a right to improve it, and take tolls as allowed by such law. That a coasting license to any boat would not authorize the use of such improved navigation, except on payment of legal tolls. (See this case in 32 *Maine R.* 343.)

In *Rundle vs. Delaware and Raritan Canal Co.*, (14 *How.* 80,) the national Supreme Court decided that the Delaware below Trenton was a public navigable river, and that the States of Pennsylvania and New-Jersey owned the soil and jurisdiction to the centre of the river, *ad filum medium aquæ*; and that each State had a right, by its agents or corporations, to divert and use its waters for canals and public works, and that an individual allowed by those States to maintain a wing dam to supply his mills, from 1791 down, could not object to it on the ground that it injured him; that his right was, in its nature, a revocable license; and that the law of New-Jersey protected the Canal Company in diverting and using the waters of the Delaware in their canal.

In *Smith, Supervisor of Hempstead, vs. Levinus*, (4 *Selden's R.* 473,) it was held, by the New-York Court of Appeals, that the people of the State, by virtue of their sovereignty, own the beds of all navigable waters within the State; that they are held for the common benefit and for the common enjoyment and convenience of all the

Above the national head of navigation all rivers belong to the purely internal commerce of the State, and are navigable in a municipal sense only. And State laws may declare any of its interior streams and rivers, that are used for boating or rafting, public highways. All questions of municipal navigability, and rights and liabilities incident to it, depend on the municipal law of the States respectively. (8 *Barb. S. C. R.* 243. 2 *Conn. R.* 349. 20 *Johns.* 99. 6 *Georgia R.* 142—145. 1 *Watts & Serg.* 346. 2 *Dev.* 30. 3 *Smedes & Marsh.* 366. 6 *Barb.* 265. 3 *N. Hamp. R.* 321. 13 *Wend. R.* 355. 1 *Penn. R.* 462. 1 *M' Cord*, 580. 3 *Blackf.* 193. 3 *Ham.* 495.)

Rivers made navigable by a State belong to the municipal class. (32 *Maine R.* 343.)

In the different States the common law and civil law, with various modifications, are incorporated as part of their respective municipal laws. All questions of municipal navigability and rights arising therefrom or connected therewith, depend on the respective laws of the States. (*Ib.*)

The principles above laid down are recognised and approved in *Cox vs. Indiana*, 3 *Blackf. R.* 196, 200. *Illinois vs. St. Louis*, 5 *Gilman's R.* 351. 6 *Humphrey's Tenn. R.* 366—368. 2 *Binney's Penn. R.* 475. 6 *Barb. N. Y. R.* 269. 32 *Maine R.* 343. 4 *Wend.* 21, and in other cases.

As to what is national or municipal navigability must be tested by actual public use and appropriation. In the case of *Weathersfield vs. Humphrey*, (20 *Conn. R.* 22,) the Supreme Court of Connecticut very properly decided that laying a road across a cove of the Connecticut River, below a port of delivery, did not interfere with navigation, national or State, as the cove was not ordinarily navigated by vessels or boats, but only occasionally by fishing-boats, skiffs or canoes. That such occasional and



temporary use was not navigation, and that those waters only were navigable where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations. That there must be some commerce or navigation which is essentially valuable. This case affirms the legality of the roads across coves and inlets along Long Island Sound, without any express State or national authority. Upon this principle, the Hudson River Rail-Road was made across bays and coves, pursuant to their charter. (12 *Barb.* 616.)

In the case of the Blackbird Creek, (2 *Pet.* 251,) the Supreme Court of the United States held, that a State law stopping up by a dam a navigable inlet was valid, unless in conflict with an act of Congress, and that it was an affair exclusively between the government of Delaware and its citizens, of which that court had no cognizance. In effect, the court held such inlets as municipal, unless made national by act of Congress.

Upon the same principle, the Supreme Court of Illinois decided that a navigable channel between an island and the Illinois shore of the Mississippi, opposite to St. Louis, might be obstructed by a road leading to a ferry, pursuant to a law of that State. (5 *Gillm.* 351.) The main and ordinary channel was left unobstructed, and the court held the State law valid.

The courts of the State of New-York have also held the doctrine, that the municipal navigability of a river depended on its actual public use, pursuant to a State law, or under such circumstances that a grant or dedication might be presumed; and that all other streams, creeks and small rivers, not so subjected to public use, were altogether private. (6 *Barb.* 265. 4 *Hill*, 369. 26 *Wend.* 404. 14 *Barb.* 517. 18 *Ib.* 488.)

The municipal authority of the States of our Union extends to passing laws to regulate the time and manner of



taking fish in private rivers and streams, and for the preservation of game, birds, animals, &c. (20 *Johns.* 90. 4 *Burr.* 2164. 6 *Cowen's R.* 376. 1 *Wend.* 260, 261.)

#### PURPRESTURE AND PUBLIC NUISANCES IN NAVIGABLE WATERS.

In the *People vs. Schermerhorn*, (19 *Barb.* 540,) it was held, by the New-York Supreme Court, that the King of England was originally the proprietor of the soil of the navigable rivers of the State of New-York, and that the royal governors had power to grant to persons, named in patents executed by them, as representing the sovereign, and that where such grants were intended to be for towns, such persons might take and hold them for such town, or they might be deemed vested in such towns as *quasi* corporations.

The court also held, that the land commissioners of the State could not grant to any one such soil under water before granted away, and that, so far as a patent covers the same, it was illegal and void.

The court also held, that around Long Island said commissioners had no power to grant land under water, except to the riparian owners, and that the lines bounding these grants must be perpendicular to the general course of the shore, to avoid conflict; and that if land under water, in front of any riparian owner's land, was granted to any other person, it was unauthorized by the statutes of New-York, and the grant would be void. (*Ib.* 556.)

In *Champlain and St. Lawrence Rail-Road Company vs. Valentine*, (19 *Ib.* 489,) held substantially the same doctrine.

Where grants are made by the United States, or by any State of our Union, of soil under the navigable waters of any great lake, navigable river, bay or harbor, the title conferred is special and limited, and not like an

ordinary title to realty. (4 *Selden*, 472—474. 4 *Wend.* 20—22, 25. 19 *Barb.* 489, 556.) As the soil below ordinary high-water mark, on the shores of the oceans, bays, harbors, naturally navigable rivers and great lakes of the United States, belong to the States respectively of our Union, so far as they are located within them, and to the United States in the District of Columbia and in the territories of the United States, the State and national governments make special grants in aid of commerce. The royal governors of New-York made a grant of a belt, about four hundred feet in width, around Manhattan Island, to the corporation of the city of New-York, for commercial objects. The sovereignty of the State and nation confers on municipal corporations and upon private and other riparian owners a right of perfecting the shores by wharves, slips, deepenings and erections, so as to facilitate the foreign and domestic trade upon the navigable waters of our harbors, rivers and great lakes. The grant is, therefore, only allowed by law to be made to riparian owners of the soil under water in front of their respective lots and lands. (*Ib.*)

The sovereign power, notwithstanding these grants, retains its power of making any improvements it pleases on the soil in front of or in the vicinity of such grants, and of controlling and regulating the riparian owners in the use of the soil under water so granted. (4 *Wend.* 20, 21. 19 *Barb.* 489. 2 *Selden's R.* 522. 4 *Ib.* 472.) The reason is, that the sovereignty holds the soil under navigable waters for the benefit of the people at large of the country, and as a governmental trust and authority for those who are of right entitled to the free use of all its navigable waters and its maritime and great lake curtilage of three marine miles from the shore, for the purposes of navigation, fishing, &c., subject to such regulations and restrictions as the government shall prescribe.

(4 *Wend.* 20, 21. 2 *Selden*, 522. 5 *Pick. Mass. R.* 492. 3 *Kent's Com.* 432 a. 12 *How. U. S. R.* 443, 454, 457. 3 *Kent's Com.* 427. 1 *Wend.* 261. 2 *Wilson's Eng. Ch.* 87, 96, 105.)

Any erection upon the soil of such navigable waters below ordinary high-water mark is a purpresture, or an appropriation to himself of what is common to the people.

This purpresture might or might not be a nuisance; and if not a nuisance, it can only be abated by order of the legislature, or that body might direct it to be seized for the use of the public, or other erections to be made in front of it. (4 *Wend.* 21. 1 *Dall. R.* 150. 7 *Bacon's Abr.* 227, 228. 9 *Wend.* 571. 18 *Vesey*, 218. 5 *Gillman's Ills. R.* 351, 367, 368, 372. *Eden on Inj.* 1st Am. ed. 157.) If not a public nuisance, the purpresture, whether a wharf or other erection, might be permitted to stand on the State soil, if deemed for the public good; and as long as the constituted authorities of the State did not think proper to interfere, persons navigating the waters might use the wharf or erection, paying such wharfage as the State allowed the owner to take. The right to take wharfage or ferry-tolls is a franchise derived from the government. (*Ib.*)

Any such purpresture that is a public nuisance is indictable, or may be proceeded against by information, and individuals may recover for their injury arising therefrom, and may apply to the equitable powers of a proper tribunal to compel the abatement of the nuisance. (12 *Pet. U. S. R.* 91, 97, 98. *The Wheeling Bridge case*, 13 *How. U. S. R.* 519.)

If the legislature authorizes such riparian owner to build a wharf for commercial purposes, and afterwards authorizes a pier or other erection, for a public purpose, in front of such wharf or in front of any riparian owner's land fronting on the nationally navigable waters, and the

shore or wharf-owner is injured, no action lies to recover for the injury from the persons or corporation making such works by authority of the legislature. (4 *Wend.* 20—23, 25. 2 *Selden*, 522. 4 *Ib.* 472.)

In the case of *The People vs. The City of St. Louis*, (5 *Gillman's Ills. R.* 35—38,) the Supreme Court of Illinois decided that the court would not interfere to abate a purpresture in the Mississippi River, within the State of Illinois, below ordinary high-water mark, unless it was found by a jury that they were a nuisance to the public generally and not merely to an individual. (p. 372. See, also, cases there cited.)

A floating, permanent fixture, raft or vessel, anchored or fastened without government license in a public navigable river, harbor, basin or at any wharf, is a nuisance, just as a carriage would be if suffered to stand in a highway. (9 *Wend.* 571. 7 *Bacon's Abr.* 227, 228. 1 *Dall.* 150.) The right of the public is to pass over a highway or navigable water, not to make a permanent appropriation of it. (*Ib.*)

In the *Attorney-General vs. The Cohoes Company*, (6 *Paige's Ch. R.* 134, 135,) the Court of Chancery granted an injunction, at the suit of the Attorney-General, against the Cohoes Company, who were about to appropriate the bank of the canal and its feeding waters, and the Chancellor held that the court had power and that it was its duty, at the instance of the State officers, to stop a purpresture or unlawful appropriation of the State property which would amount to a public nuisance.

It would seem that in cases of purpresture the remedy is by information, by indictment or by municipal action, where the State power is conferred upon a municipal body. The remedy of an individual for an incidental injury arising from the purpresture would seem to be by a resort to one of the above modes of redress, as the legisla-

ture may previously authorize or subsequently approve by those on whom its power is conferred, a work that would otherwise be an unlawful encroachment upon the State soil under navigable rivers, lakes or harbors, upon canals, highways or other public property or works. And if so approved, no individual can maintain a suit for what would otherwise be a purpresture. (See *post*, c. 5, § 20.)

In *The Commonwealth vs. Pittsburgh and Cincinnati Rail-Road Company*, (24 *Penn. St. R.* (12 *Harris*,) 160, 18 *St. R.* 334,) the Supreme Court of Pennsylvania held, that the court could protect the public property and State canals from encroachment by injunction, and that the State superintendents of public works might at once abate a house or other erection on the embankment of a rail-road, though a jury had found that it did no injury.

The same was held by the Superior Court of New-York in the case of the State of New-York *vs.* The Corporation of New-York. (3 *Duer's R.* 120.)

#### NATIONAL IMPROVEMENTS.

SEC. 6. For the attainment of national objects by constitutional means, Congress may execute works of improvement in which the republic or two or more States are interested. It may, by law, select and use any appropriate constitutional means. (4 *Wheat.* 411, 420—423. *Const.* art. 1, § 8; *post*, § 31. 4 *Webster's W.* 248—257.)

Mere local improvements, which belong to the municipal care of any one State, seem not to belong to Congress or the general government. The line of discrimination in practice is not precisely settled by judicial authority.

## HARBORS AND RIVERS.

Various acts of Congress have been passed for the improvement of harbors and navigable rivers. Lake and ocean harbors have been improved under acts of Congress, and so have navigable rivers up to their highest ports of delivery. As Congress has extended the admiralty and commercial jurisdiction of the national courts, with the approval of the Supreme Court, to the great lakes, and as vessels navigate there under a United States license, these lakes must be deemed within the jurisdiction of the general government. It is difficult to see any solid legal objection to the improvement, for a national object, of the navigable rivers, and of the ocean and lake harbors of the Union by Congress.

## TRANSIT DUTIES.

SEC. 7. The power of Congress over trade and intercourse includes commerce by land as well as by water between all the States of our Union. No State has any right to tax any citizens of the United States, or aliens permitted by the general government, to enter a State for ingress into or egress from such State. Nor can any State of our Union levy any transit duties in any form upon merchandise or property passing from one State to another by land or water. (Passenger cases, 7 *How.* 394, 395, 421. 12 *Ib.* 452, c. 5, § 3. 15 *Pet.* 504—507.)

## INGRESS AND EGRESS.

SEC. 8. All citizens of the United States and foreigners may freely enter and depart from any State of our Union, unless an act of Congress or treaty shall otherwise pro-

vide, the national government having exclusive jurisdiction over inter-state and foreign commerce. Acts of Congress and treaties in the main regulate all intercourse and trade between the States of our Union and between our republic and foreign nations.

Our States possess, however, police powers, and may pass laws to guard against the introduction of foreign offenders, paupers or aliens of offensive cast. These necessary municipal laws are valid, except so far as they may conflict with the Constitution, or a treaty of the United States, or an act of Congress. (15 *Pet.* 507. 7 *How.* 283. 11 *Pet.* 102. 14 *Ib.* 568, 569.)

Upon this principle State laws are passed excluding slaves and free persons of color from entering some of the States. (15 *Pet.* 507, 508.)

#### COMMERCE WITH THE INDIAN TRIBES.

SEC. 9. This is an exclusive power vested in Congress. (1 *U. S. St. L.* 137, 138. 2 *Ib.* 6, 139, 146, n. a. 5 *Ib.* 143, 144. *Worcester vs. Georgia*, 6 *Pet.* 561, 562. *Cherokee Nation vs. Georgia*, 5 *Ib.* 1, 36—44. 5 *Wheat.* 49, 50. 2 *Ib.* 270, c. 7.)

As long as the President or national government shall recognise a tribe of Indians as such, living under the protection of the republic, this exclusive jurisdiction continues. When that recognition is withdrawn, or the tribe dissolves into individuals, the Indians fall under the municipal laws of the States where they reside, like other persons, with such political rights as they may confer. They would not become citizens of the United States or of the State, but would be an anomalous people, having such personal and political rights as our laws confer on them. (*Ib.*)

In Georgia, an attempt to establish a permanent Indian

government, wholly independent of the State, an *imperium in imperio*, led to unpleasant conflicts, wisely settled by the purchase of the Cherokee possessory title for a very large sum by the national government, and by setting apart for the Cherokees, west of the river Mississippi, a large and fine territory beyond the limits of any State, where the tribe may enjoy self-government. Similar arrangements have been made with other tribes formerly located within States.

## LAND UNDER WATER AND FISHERIES.

SEC. 10. The power of Congress over commerce among the States and with foreign nations does not reach the soils under navigable waters within the States, except so far as the attainment of national objects may require. The title to such soils, from ordinary high-water mark on the shores of navigable rivers, of the seas, oceans, bays and great lakes, is vested in the respective States whose territories include them. (3 *How.* 230. 5 *Ib.* 454. 4 *Wash. C. C. R.* 383.) The fisheries appurtenant to such soils belong to the States owning them, and to their grantees. (*Ib.*)

The State right to these soils and fisheries must be exercised in subordination to the paramount commercial and other authority of the national government, (*Ib.*) and to the free common use of all public navigable waters by all American citizens. (*Ante*, § 5.)

## NATURALIZATION.

SEC. 11. Congress has exclusive power to establish a uniform rule of naturalization and confer on aliens American citizenship, and no State can exercise it. (*Const.* art. 1, § 8. 2 *Wheat.* 269. 5 *Ib.* 49. 1 *Sandf. R.* 583.),



A State may confer on aliens any State municipal right. (*Ib.* *Const. Wiscon. of 1848*, art. 3, § 2. 2 *Binney's R.* 110. *Const. Mich.* art. 2, § 1.)

It would seem that if a State, as it may, confer the right to vote on resident aliens, it ought not to be extended to voting for Presidential electors or members of Congress, as our acts of Congress prescribe the mode and time of converting foreigners into American citizens. (12 *Wheat.* 277, and above authorities. 5 *How.* 417.) The Constitution of the Union having been made by American citizens, for themselves and their posterity, as the governing power, with liberty to Congress only to add adopted citizens, a State cannot do it, either directly or indirectly. (*Ib.* c. 7.)

Though this seems to be the theory of our government, Michigan and Wisconsin have been admitted, with provisions allowing, by State law, to certain resident aliens a general right to vote, hold, take and transmit real estate, and this liberal policy towards resident aliens filing declarations of their intention to become citizens will doubtless be followed in the new States. And, it must be admitted, that if they vote for members of the legislature, and they appoint Presidential electors and United States senators, it would seem that to exclude such voters from participating in electing members of Congress would be inconvenient and of no practical advantage.

#### NATURALIZATION LAWS.

SEC. 12. Our naturalization acts of Congress establish the principle of public law that all men may expatriate themselves, and that any nation may receive them as citizens by adoption. (2 *U. S. St. L.* 153, 292, 811. 3 *Ib.* 53, 258. 4 *Ib.* 69.)

These acts authorize the naturalization of free white

persons only, (*Ib.* c. 7,) upon complying with the following conditions:

1. "The alien must declare, on oath or affirmation, before the Supreme or Superior Court of a State or territory, or a State Court of Record having common law jurisdiction, and a clerk, prothonotary and seal, a Circuit or District Court of the United States, or before the clerks of either of said courts, two years before his admission at least, that it was his *bona fide* intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate or sovereignty whatever, and particularly by name, the prince, potentate, State or sovereignty whereof such alien may, at the time, be a citizen or subject. (Vol. 2, p. 153, § 1, p. 155, § 3; vol. 4, p. 69, § 4.)

2. "That he shall, at the time of his application to be admitted, declare, on oath or affirmation, before some one of the courts aforesaid, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every prince, potentate, State or sovereignty, whereof he was before a citizen or subject;" which proceedings are required by the acts of Congress to be recorded by the clerk. (*Ib.* p. 153.)

3. "That the court admitting such alien must be satisfied that he has resided within the United States five years at least, and within the State or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction, that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same: Provided, that the oath of the applicant shall in no case be allowed to prove his residence. (*Ib.* p. 153, § 1; vol. 4, p. 69, § 4.)

4. "If the applicant has borne a title of nobility or any hereditary title, he is required to renounce that, and the act of renunciation must be recorded."

The taking of the preliminary oath and filing the application may be done by and before the clerk of the proper court, as well as before the court. (1 *Wood. & Minot's C. C. R.* 323, 324.)

No citizen or subject of a nation with whom the United States are at war can be naturalized here while the war continues.

Aliens residing in this country before January 29th, 1795, may be admitted on due proof before such courts of two years' residence here and of one year's residence immediately preceding the application within the State or territory where the court is held, and on making the renunciations above required, and proving residence, attachment to our Constitution, good character, and renouncing all hereditary titles and every title of nobility, all of which the clerk is to record.

All aliens arriving in this country subsequent to April 14th, 1802, must, in order to become citizens of the United States, make registry, and obtain certificates, in the following manner, to wit: "Every person desirous of being naturalized shall, if of the age of twenty-one years, make report of himself; or if under the age of twenty-one years, or held in service, shall be reported by his parent or guardian, master or mistress, to the clerk of the District Court of the district where such alien or aliens shall arrive, or to some other court of record of the United States, or of either of the territorial districts of the same, or of a particular State; and such report shall ascertain the name, birth-place, age, nation and allegiance of such alien, together with the country whence he or she migrated, and the place of his or her intended settlement." And the clerk is required to record the report in his office,

and to give, under his hand and seal, a certificate of such report and registry, for which he is allowed fifty cents, and such certificate is required to be presented to the court, on an application for naturalization, by aliens arriving after April 14th, 1802. (Vol. 2, pp. 134, 135, § 2.)

Children of aliens naturalized, if under twenty-one years of age at the time of such naturalization, become citizens, if dwelling in the United States. (Vol. 2, p. 155, § 4.) But no right of citizenship can be so acquired where the father has never resided in the United States. (*Ib.*)

Aliens, if residing in our Union between June 18th, 1798, and the 14th of April, 1802, and who have continued to reside within the same, may be naturalized without a compliance with the first condition above set forth, as to registry and declaration of intention, &c., (vol. 2, p. 292, § 1;) where the alien, after having complied with the first condition and having made registry as above, dies before he is naturalized, his widow and children may be naturalized, on taking the oaths prescribed by law. (*Ib.* p. 134, § 2; p. 293, § 2.)

Any free white person, being a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein until his application to become a citizen, may, after a five years' residence, including his minority, be admitted a citizen, without complying with said first condition three years before; but he may make such declaration at the time of admission, and he must also declare on oath and prove that for three years preceding he had actually intended to become such citizen of our Union, and shall in all other respects conform to the provisions of the law. (Vol. 4, p. 69, § 1.)

Certain other persons arriving prior to April 14th,

1802, and continuing to reside in the United States, may be admitted as citizens. (Vol. 3, p. 259, § 2.)

Such aliens must, in all cases, have continuously resided in this country five years next preceding their admission, without at any time being out of the United States. (Vol. 2, p. 811, § 12; p. 153, § 1.)

By the twelfth section of an act of Congress of 1813, (2 *U. S. St. L.* p. 811, § 12,) it was provided that no person arriving in the United States after March 3d, 1813, should be admitted a citizen of the United States, who should not, for the continued term of five years next preceding his admission, have resided within the United States, and not at any time departed therefrom.

By act of Congress, passed in 1848, the said twelfth section was repealed. (*Acts of 1848*, p. 55.) It seems that a residence of five years would be sufficient, though a temporary absence from the republic should occur.

During the five years such inchoate naturalization gives the party, during such temporary absence, the character of an American citizen, so far as to entitle him to American protection. It was so held in the case of the Hungarian, seized forcibly at Smyrna by the Austrian consul's direction, and carried on board an Austrian vessel of war. It would seem to be just that the party should look to his adopted country during his probationary period to shield him from foreign injury.

The forging or false uttering or using any forged naturalization certificate is made a felony. (2 *U. S. St. L.* 811, § 13.)

It has been held, and correctly, that the acts of Congress vest the courts named with the judicial power over cases of naturalization, and that they cannot transfer the authority to their clerks or to anybody. (18 *Barb.* 444.)

By our treaties, foreigners may be converted into American citizens in the mode and upon the conditions pre-

scribed in them, or the same may be effected by acts of Congress. Our treaties for the cession of Louisiana and Florida, and our Mexican treaty of 1848 ceding California, New-Mexico, &c., are examples of the former, and the act annexing Texas of the latter. (8 *U. S. St. L.* 202, 256. 5 *Ib.* 797. 1 *Pet.* 542. *Acts of Cong.* 1848, p. 270. *Const. Calif.* art. 2, § 1.)

#### STATE LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

SEC. 13. The Constitution of the Union prohibits a State from passing a law impairing the obligation of contracts. (*Art.* 1, § 10. 4 *Wheat.* 122, 209. 8 *Ib.* 1. 6 *Cranch*, 87. 6 *Wheat.* 121. 4 *Ib.* 627. 12 *Ib.* 213. 1 *How.* 211. 3 *Ib.* 145—147. 2 *Ib.* 608, 614. 5 *Ib.* 310. 6 *Pet.* 643. 26 *Wend.* 44.)

The Supreme Court of the Union have decided, that the word contracts here means all property agreements and contracts of value executed and executory. And that all grants of land, all charters for colleges and eleemosynary corporations authorizing them to receive donations and grants for corporate objects, and all compacts between two or more States, or between any State and the United States, and all legal contracts between a State and private corporations, or a State and any person.

Though the contract of marriage is *publici juris*, and not subject to be dissolved by the consent of the parties, Judge Story, in the Dartmouth College case, declared his opinion that a State legislature could not, by law, dissolve a marriage contract against the wishes of either party, unless it had been violated. (4 *Wheat.* 695, 696.)

The court has also decided that a State law, impairing the substantial efficiency of the remedy for enforcing a contract, or enacting that a statute of limitations shall immediately take effect, so as to leave no reasonable

opportunity to enforce past contracts, is within the constitutional prohibition. It has decided that States may change their remedies to enforce contracts, if neither the contract nor the security for its performance is impaired. (1 *How.* 310. 8 *Wheat.* 1. 3 *How.* 116, 717, and cases above cited.)

A contract by a State or a State law, which in effect divested a legislature of its legislative constitutional power over any subject, is void as against any future act of the legislature repealing it or conflicting with it. Such an assignment or nullification of any power conferred by a State constitution is void or voidable, as being beyond its power. (*Post*, § 20.)

Acts or contracts of municipal corporations assigning away or divesting the body for a time of its legislative or executive power over any matter, may be legally revoked as acts of usurpation. (5 *Cow.* 538. 6 *Wheat.* 593, and *New-York Mayor vs. Britton*, decided in 1845, by the Supreme Court of New-York, Chief Justice Nelson giving the opinion.)

Such repealing legislative acts by a legislative or municipal body do not legally violate contracts, as they were *ab initio* voidable. (*Post*, § 20.)

A brief review of the leading cases decided in the Supreme Court of the United States, relative to the meaning of the constitutional provision prohibiting State legislatures from passing laws impairing the obligation of contracts, will give a distinct idea of the effect of that provision. In *Greene vs. Biddle*, where the court held the occupying claimant laws of Kentucky unconstitutional and void, on the ground that they violated the compact between Virginia and the people of Kentucky, when the latter, with the assent of Congress, became a State, we find a sound and clear exposition. (8 *Wheat.* 84.) The court say, that the objection to a law, on the ground of



its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. (See 6 *How.* 327.)

In *McCullough vs. Maryland*, (4 *Wheat.* 316,) the same doctrine is asserted. In *Fletcher vs. Peck*, (6 *Cranch*, 87,) a grant by a State was held to be a contract executed, and that a repeal of the law authorizing the first conveyance was of no effect and void; and that a law directing a second grant of the land was also unconstitutional and void, as impairing the first conveyance—a contract executed.

In *Bronson vs. Kenzie*, (1 *How.* 316,) the court, referring to the decision in *Greene vs. Biddle*, said that, "On the part of the demandant in that case, it was insisted that the laws of Kentucky, passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. If these acts change the nature and extent of existing remedies so materially as to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." (See, to same effect, 6 *How.* 327.) In *Bronson vs. Kenzie*, the court, on that principle, held a law of Illinois void, as it so changed the remedy on a mortgage as to impair the holder's rights. A statute of Indiana was held void on the same ground, in *Grantley's Lessee vs. Ewing*. (3 *How.* 707, 717.) The



court say, that in *Bronson vs. Kenzie*, they held that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State where it was made, and that the statute of Illinois impaired the obligation of the contract—the mortgage.

In the *Trustees of Dartmouth College vs. Woodward*, (4 *Wheat.* 518,) the court held, that the charter by the King of Great Britain, to Eleazer Wheelock and others, constituting him and eleven others, and their successors by them appointed, forever, a corporation, with power to receive grants of lands and donations, and to hold property, &c., for Dartmouth College, under which they had received large grants and contributions from the States of New-Hampshire and Vermont, and from many persons in England and America, was a contract to which the donors, the trustees and the crown (to whose rights and obligations New-Hampshire had succeeded) were the original parties. The court add, (p. 644,) it was a contract for the security and disposition of property; that it was a contract, on faith of which, real and personal estate had been conveyed to the corporation; that it was a contract within the letter of the Constitution, and within its spirit, also. The court (p. 653) held the trustees to be the legal representatives of the donors as to the trust, and the legal representatives of the corporation. The statutes of New-Hampshire, altering the charter of the college materially, without the consent of the trustees, were adjudged a violation of the charter contract, unconstitutional and void.

The court held in that case, (p. 629,) that the constitutional prohibition against any State passing any law impairing the obligation of contracts, had never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature

to legislate on the subject of divorces. Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other.

In the case of *New-Jersey vs. Wilson*, (7 *Cranch*, 164,) it was decided that a sale of part of the lands of the Delaware Indians to the State, and the reservation of a part, it being agreed that the reservation should never be taxed, and the State law so declaring as part of the contract, that the exception from taxation enured to after-purchasers of the reservation; and that the State, by repealing the law, so far as it exempted the land from taxation, could not subject it to taxation, as the repealing law impaired a valid contract. In *Armstrong vs. The Treasurer of Athens County*, (16 *Pet.* 289,) the last case is cited and approved, on the ground that the State contracted, for a full consideration paid, for a perpetual exemption of the reservation from taxation. In the case of *Armstrong vs. The Treasurer*, it was adjudged that no such contract existed, as there was no contract extending the exemption from tax to the then owners of the land.

In the case of the *Charles River Bridge vs. The Warren Bridge*, (11 *Pet.* 420,) a corporation was empowered, in 1785, to build a bridge across Charles River, and take tolls for forty years, upon paying two hundred pounds yearly to Harvard College. In 1792 the Charles River Bridge Corporation was, by a statute of the Massachusetts legislature, extended to seventy years instead of forty. In 1828 the legislature granted a charter to the Warren Bridge Company to construct a toll-bridge from a point near the first bridge across Charles River to Boston, and which after a few years was to be, and had, in fact, become free, and thereby destroyed the value of the property of the first corporation. The Charles River Bridge Corporation filed a bill to prevent the erection of the

Warren Bridge, and for relief, on the ground that the second charter impaired the provisions of the first, as a contract of the State with the corporation. The Supreme Court of Massachusetts decided that the Warren Bridge charter did not violate any contract of the State, though it rendered the first of no value, and they dismissed the bill. (p. 548.)

The Supreme Court of the United States say, (pp. 548, 549 :) "In order, then, to entitle themselves to relief, it is necessary to show, that the legislature contracted not to do the act of which they complain, and that they impaired, or, in other words, violated that contract by the erection of the Warren Bridge." And as the Supreme Court of the United States held that no contract of the State existed forbidding the granting of the second charter, the judgment of the court below, dismissing the bill, was affirmed.

In this case the court held that no contract not to grant a rival toll-bridge or free-bridge was to be implied from the payment to Harvard College, or from any terms of the charter; and that nothing but an express stipulation to that effect could divest the legislature of the power to grant a rival bridge, though it might destroy the value of the first corporate bridge company. (11 *Pet.* 544, 545. 10 *How.* 534. 8 *Ib.* 585. 3 *Sandf. R.* 658, 659.)

Powers are implied in corporate charters which are necessary to express powers. (6 *How.* 322.)

It is a general principle that no corporation has any powers and rights except those expressly conferred upon it by its charter, or necessarily incident. (4 *Pet.* 168, 514. 11 *Ib.* 544, 545. 6 *How.* 322.) No claim to exclude competition can be supported unless a legislature expressly stipulates to that effect. (See 13 *How.* 71. 14 *Barb.* 412.)

A corporation may be dissolved by a State without violating any constitutional prohibition. (8 *Pet.* 281.)

A State law, destroying the right of a corporation to transfer negotiable securities, bills, notes, &c., impairs the obligation of contracts, and is unconstitutional and void; corporations being protected like individuals in respect to their property. (6 *How.* 301, 507.)

A repeal of a right to ferry by a State law is legal. (10 *How.* 534. *Post*, § 20. 8 *How.* 581.)

In *Curran vs. State of Arkansas*, (15 *How.* 304, 319—321,) it was held, that where a State created a bank of which it was sole stockholder, it could not, after its failure, appropriate to its use its funds and securities, as it changed the contract with the bill-holders and creditors of the bank, and their rights and remedies, and became unconstitutional, as violating the obligation of such contracts.

#### MUNICIPAL CORPORATIONS.

SEC. 14. Municipal corporations of a public character, as towns, cities, counties, &c., may be created, repealed and modified by State laws, except so far as the respective constitutions of the States prohibit them. (4 *Wheat.* 693, 694.) The reason of the rule is, in the language of Judge Story, in *Dartmouth College vs. Woodward*, (p. 694,) that there is express or implied contract, that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the legislature. And he adds, "But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional provision, as a like contract would be between two private citizens. Will it be contended that

the legislature of a State can diminish the salary of a judge holding during good behavior? Such an authority has never yet been asserted to our knowledge. It may also be admitted that corporations for mere public government, such as towns, cities and counties, may, in many respects, be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may at will take away the private property of the corporation, or change the uses of its private funds acquired under the public faith."

State laws authorizing divorces are made on the principle of giving relief to the injured party for the violation of the marital contract by the other party to it. In *Dartmouth College vs. Woodward*, (pp. 695, 696,) Judge Story said: "A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract." He proceeds to affirm that a State law annulling a marriage contract without assent of the parties, or any default of either party, would be void, as it would violate a contract. "A man," says the Judge, "has just as good a right to his wife as to the property acquired under a marriage contract." Chief Justice Marshall's opinion in the same case is to the same effect. (4 *Wheat.* 629.)

The exercise of the legislative power of a municipal body may affect rights and yet not violate a contract.

Municipal corporations are generally vested with power

to regulate municipal and local matters; and generally, where a power to judge and decide in a legislative character exists, no court can review or reverse such a decision, subject, however, to constitutional limitations, such as municipal orders and ordinances regulating streets, wharves, slips, sewers, &c., and when the legislature appoints commissioners to judge, decide and regulate any matter—as, for example, Commissioners of Emigration—under a statute of New-York. (2 *Selden's R.* 522. 4 *Omst. R.* 195. 4 *Wend.* 21. 6 *Wheat.* 593. 14 *N. Y. Ap. R.* 360. 7 *Cowen's R.* 585. 26 *Wend.* 485.)

## PATENTS.

SEC. 15. Congress has exclusive power to grant patents for new and useful inventions.

By acts of Congress, an invention to be patentable, must be new and useful and a first invention. (2 *Wood. & Minot's R.* 141. *Curtis on Patents*, 1, 4.)

Where a patent is for a combination that is new and useful, of certain known parts, another patent may be granted for a new machine combining a portion of the things so combined, or them and something different. (16 *Pet.* 341.)

If any inventor makes his discovery public and allows its free use, he thereby abandons it to the public, and a right to it cannot be patented. (1 *How. R.* 207. 7 *Pet.* 317.)

## COPYRIGHT.

SEC. 16. The acts of Congress relative to copyrights will be found in 4 *U. S. St. L.* 436—439, 728.)

A copyright may be granted not only for a work of new materials, but also for a new and original combination

of old materials. (3 *Story's C. C. R.* 657. 10 *Law Reporter*, 83.)

In *Wheaton et al. vs. Peters & Gregg*, (8 *Pet.* 657,) the Supreme Court of the United States held, that an author has a right of property in his manuscript, and is entitled to a remedy against any one who seeks to deprive him of it or to improperly obtain a copy of it. That the common law of England is in favor of this right. But that the common law of England is not the law of the United States, except so far as it is embodied in the Constitution or laws of the Union, and thus made part of our federal system by adoption. (p. 658.)

#### SUITS BY AND AGAINST STATES, SOVEREIGNS AND NATIONS.

SEC. 17. A sovereign, king, State or government of a nation may sue in their own or foreign courts by agents appointed by law to represent them, and the court may then pass judicially upon the claims of plaintiff and defendant, though involving the construction, validity and effect of treaties; and though a sovereign, king, State or government, foreign or domestic, cannot be sued as a defendant and compelled to submit to judicial power, except by consent or compact, yet where a suit is brought by its agents in chancery, a cross-bill may be filed against them, and the court will enforce against such plaintiff an equitable defence so presented. This doctrine is applicable, it would seem, to the States of our Union as well as to foreign nations. (12 *Pet.* 740—742. 1 *Barb. Ch. R.* 163. 8 *Paige's Ch. R.* 537. *Post*, § 24. 2 *Hill's R.* 166. 9 *Wheat.* 738. 11 *How. N. Y. R.* 1. 1 *Baldwin's C. C. R.* 216, 217. 5 *Duer*, 634. 1 *Doug. Mich. R.* 225. *Harrison's Mich. Ch. R.* 290.)

In *Garr vs. Bright*, (1 *Barb. Ch. R.* 163, 164,) Chancellor Walworth decided that the court had not power to com-



pel a State to perform a decree, but that a State, by its attorney-general, might be made a party defendant to enable it to appear and protect its rights, and to adjust the equities finally as between other parties to the suit.

In *Rhode Island vs. Massachusetts*, (12 *Pet.* 741, 742,) the Supreme Court of the United States held, that "a foreign sovereign may sue in an English court of law or equity was settled in cases brought by the King of Spain, (*Hob.* 113.) That a foreign government may sue in chancery by such agents as it authorizes to represent them on whom a cross-bill can be served, with such process as will compel them to do justice to the defendant, was decided in the *Columbian Government vs. Rothschilds*, (1 *Sim.* 104.) These cases were recognised in the *King of Spain vs. Machado*, by the House of Lords, who held that a king had the same right to sue as any other person, but that when he did sue in chancery it was as any other suitor who sought or submitted to its jurisdiction; that it could decide on the construction and validity of the treaties between France and the allied sovereigns of Europe in 1814, and on the validity of a private and separate treaty between France and Spain."

The United States cannot be sued unless an act of Congress shall allow it, (11 *How.* 272. 4 *Ib.* 288,) and a decree for costs against the United States cannot be entered unless allowed by such act. (*Ib.*)

A State of our Union may, by the federal Constitution, be sued by another State of our Union or by a foreign king or nation, but a legislative consent is necessary, in other cases, to authorize a suit against a State, unless a State sues by its agents and a cross-suit is necessary to enable the court to do justice, and *pro tanto* State sovereignty is waived. (*Const. U. S.* art. 3, § 2. 11 *Pet.* 321. 6 *Wheat.* 264, and cases above cited.)

The United States and foreign nations may sue in State



courts having jurisdiction of the parties and causes of litigation. (*Ib. Post*, §§ 24, 35, 37.)

When a State or the United States becomes a shareholder in a bank or association, sovereignty is *pro tanto* waived, and no privilege of sovereignty is allowed. (11 *Pet.* 318. 9 *Wheat.* 904. 6 *Hill*, 35, 37. *Pennsylvania vs. Wheeling Bridge Company*, decided in 1852.)

Where the law of nations is the ground of the plaintiff's claim in American courts, it would seem that the national courts would be the appropriate tribunals, as the general government has exclusive charge of our foreign relations. (14 *Pet.* 569, 570. 1 *U. S. St. L.* 118, § 28; p. 77, § 9. 5 *Ib.* 539. 2 *Hill's R.* 160. 2 *Wood. & Minot's R.* 1—10.)

State courts may entertain suits, unless deprived of jurisdiction by the Constitution or acts of Congress, by sovereigns and States, on the principles above stated. In administering the law in such cases, the *lex fori* governs. (6 *Wheat.* 405. 2 *Hill's R.* 160.)

#### LIMITATIONS OF LEGISLATIVE POWER.

SEC. 18. Congress and the State legislatures have limited powers, and the restricting provisions, in form or in effect, are found in the national and State constitutions. All acts of Congress, or State laws without the pale of their respective legitimate authority, are unconstitutional and void, and ought to be so held by any national, State or other court where such act or law is set up in a judicial proceeding, or where it properly becomes a matter of judicial cognizance. (4 *Hill*, 144. 3 *Dall.* 199. 6 *Barr. Penn. R.* 515. 9 *How.* 603, 614.)

SEC. 19. Where the national or a State constitution confers on Congress or a State legislature, or the President, or any governor or department a power, it is not

the province of the judiciary to revise the expediency of executive or legislative action, provided the limits of their authority are not transcended. (7 *How.* 39—42. 3 *McLean's C. C. R.* 107, 110. 2 *Wheat.* 19, 29. 12 *Pet.* 526. 11 *How.* 272, 289. 4 *Wheat.* 63, 64. 9 *Barb. R.* 350.)

SEC. 20. Congress, a State legislature, or a municipal body acting in a legislative and governmental capacity, may repeal or modify any law or resolution, unless its effect will be to divest a vested right of property, or annul a contract or compact, and not merely revoke the grant of a political franchise or change a police regulation. (10 *How.* 534, 535. 7 *Pet.* 243. 11 *Ib.* 538. 6 *Cranch*, 87. 5 *Cow. R.* 538. 6 *Wheat.* 593—598. 14 *How.* 80, 568. 10 *Ib.* 534. 13 *Ib.* 71.)

Acts or grants of legislatures are to be construed strictly as to public rights, and not extended by construction. (8 *How.* 581.)

If any constitutional prohibition for the security of person or property is violated, it would seem that the act would be void, or a right of action for damages would accrue to the party injured by it. (*Ib.* 13 *Wend.* 355.)

But a law exempting certain property from execution, for the safety of families and their support, relates to the remedy merely, and is valid as to existing and future debts. (1 *Kernan's N. Y. Ap. R.* 281.) So any law changing the remedy and the mode merely of enforcing a contract, without taking away or impairing a lien then existing on property, would not violate the constitutional immunity of contracts.

In the case of the Presbyterian Church *vs.* The Mayor, &c., of New-York, (5 *Cow.* 538,) it was decided, that where the defendants had conveyed to plaintiffs, with covenant of quiet enjoyment, land for a church and cemetery, and afterwards defendants, pursuant to a State law,

passed a law prohibiting the use of the land as a cemetery, it was held, by the Supreme Court, that the municipal corporation of New-York had legislative powers, and that "they had no power, as a party, to make a contract which should control or embarrass their legislative powers and duties." That the act of defendants, (say the court,) being authorized by the legislature, "whether it be their act or an act of the local city legislature, makes no difference." The court again says, "the defendants had no power to limit their legislative discretion by covenant; and they are not estopped from giving this answer." And the court held the city law not a breach of the covenant of quiet enjoyment which entitled to damages.

In *Barron vs. Baltimore*, (7 *Pet.* 244,) is a report of a decision of the Maryland Court of Appeals, where city legislation in grading streets and regulating sewers had incidentally caused increased deposits of sand and earth in front of plaintiff's wharf to his great injury, and the court held no action could be maintained for his damages.

A right to take tolls for ferrying or wharfage is a public franchise, and can only be exercised by permission of the sovereign, or the State within whose territory the wharf or ferry is situated; and such State license may be given and revoked at pleasure, as it is an inherent sovereign power that cannot be alienated, so as to place it beyond the reach of legislation. (11 *Wend.* 586—589. 4 *Ib.* 21. 13 *Illinois R.* 28. 10 *How. U. S. R.* 511, 534, 535. 5 *Yerger's R.* 190. 6 *Georgia R.* 142—145. 3 *Missouri R.* 470. 6 *Ib.* 455, 456. 5 *Ib.* 36. 8 *Maine R.* 365. 3 *B. Munroe's Law & Eq. R.* 516. 9 *Ib.* 202.)

A State legislature has a right to take, or allow to be taken, by virtue of eminent domain, any private rights necessary to establish ferries. (5 *Yerger's R.* 190. 6 *Georgia R.* 142, and ch. 3. 8 *Maine R.* 365.) The Su-

preme Court of the United States held this doctrine in the Illinois Ferry case. (8 *How. U. S. R.* 581.)

A grant of a right to erect a wharf or to use any public franchise is, by legal implication, subject to the inherent reserved right of the legislature to regulate its use, tolls, wharfages, ferriages, &c., with a view to the public advantage, and as often and as the public good shall require. (See the opinion of Chancellor Walworth in the Court of Errors of New-York, 4 *Wend.* 23, and Hartford Ferry case in the Supreme Court of the United States, 10 *How.* 535, and the Illinois Ferry case, 8 *How.* 581.)

#### ASSIGNMENT OR LOSS OF LEGISLATIVE POWERS.

SEC. 21. Congress and State legislatures must exercise the respective powers vested in them by the national and State constitutions, and they cannot transfer or cede them to be used by the people or other bodies, unless the same is expressly authorized by a constitutional provision. (5 *How.* 438. 6 *Barr. Penn. R.* 515. 4 *Hill*, 144. 12 *Wheat.* 289.) Such legislative powers are fiduciary, and are incapable of assignment.

But a law to take effect on a contingency, to be officially proclaimed by the executive, is legal, as it is not a transfer of power. (*Ib.* and 9 *Barb. R.* 680.)

Nor can Congress or a State legislature be divested of any public franchise or of any legislative power by any use or usurpation by individuals, by corporations or by other bodies, as such powers are so vested for the common benefit of the people, and ought to be exercised as often and in such way as the public interests may demand. (*Ante*, § 20. 18 *Johns. R.* 230. 4 *Mass. R.* 522.)

If one set of men might appropriate and acquire, by user, public rights not granted pursuant to a statute, the national and State powers might be appropriated sur-

reptitiously, in violation of express constitutional provisions. Such a principle would be subversive of constitutional governments. The Court of Appeals of New-York have so decided. (4 *Selden's R.* 483. 10 *How.* 535.)

In the *People vs. Collins*, the Supreme Court of Michigan decided, that a State legislature, vested by the State constitution with the law-making power, cannot delegate it to the people or to any other body, it being fixed, elementary and fiduciary in its nature.

This principle prohibits the passing a law to take effect or not as a popular vote may decide, except in cases where the constitution of a State specifically so declares. A law to take effect upon the happening of a particular event is a valid act, and not within the above principle.

In *Barto vs. Nimrod*, (4 *Selden's R.* 496,) the New-York Court of Appeals decided, that the legislature could not pass a law to take effect or be defeated at a future day, according to the result of a popular vote. This would be assigning the legislative power vested by the constitution in that body, as a sole depository of the law-making power, to another and substituted legislative body.

But Congress and a State legislature may make a law to take effect on the happening of a future event.

#### REMODELLING MUNICIPAL CORPORATIONS.

SEC. 22. A State legislature may remodel municipal corporations, but it cannot take their funds without their consent, from their municipal appropriation, and divert them to any other public use, without making full compensation. (4 *Wheat.* 629, 694. 11 *Pet.* 642. 16 *Mass. R.* 86, 216, 217.)

Congress, in legislating, seems bound by the same constitutional law.

CONFLICT OF LEGISLATION.

SEC. 23. When Congress and the States have concurrent legislative power over the same subject, a State law duly enacted is valid until an act of Congress shall pass in conflict with it, and then the State law is suspended during the continuance of the act of Congress. (4 *Wheat.* 196. 3 *How.* 437. 5 *Ib.* 574.)

In cases of bankruptcy this conflict may arise, and the act of Congress may wholly suspend the State laws, and confer on the national courts jurisdiction of the main and of all incidental questions. (3 *How.* 120, 311.)

SUITS IN STATE AND NATIONAL COURTS.

SEC. 24. A State court may entertain jurisdiction of a cause where a State may be a party, plaintiff or defendant, for the purpose of protecting the rights of such State; though it cannot enforce a decree against a State, but can merely act *in rem* for the purpose of protecting the rights of all parties. (1 *Barb. Ch. R.* 163, 164. 8 *Paige's Ch. R.* 527. 2 *Hill's R.* 166. 14 *Johns.* 95.) In the case of *Delafield vs. The State of Illinois*, 2 *Hill*, 165, 166; 26 *Wend.* 192, and *S. C. ante*, § 17,) Mr. Justice Bronson, in giving the opinion of the Court of Errors of New-York, says: There are several classes of cases where, although the federal courts have jurisdiction, the State courts have constantly exercised concurrent powers, and their right to do so has never been seriously questioned. The following cases may be mentioned: 1. Where the United States sue. 2. Where a State sues a citizen of another State. 3. Where it sues an alien. 4. Where a citizen of one State sues a citizen of another State. 5. Where a citizen sues an alien. 6.

Where an alien sues a citizen. These are cases where the jurisdiction of the federal courts depends on the character of the party. But the State courts have also exercised concurrent powers in cases where the jurisdiction of the federal courts depends on the nature of the cause.

It has been held that the federal courts had no original jurisdiction where both parties were aliens, and that in such cases the State courts alone had jurisdiction in transitory actions. But if an alien sues an alien in a national court, and an exception is not taken on that account, the court will hear and decide the matter. Justice Woodbury, in a cause before him, held that an alien could sue an American citizen in a national court. (2 *Wood. & Minot's C. C. R.* 15. See 7 *Pet.* 431, to the same effect.)

#### STATE LAW, INTERPRETATION AND EFFECT.

SEC. 25. State constitutions, laws and usages, relating to immovables or realty within the State, unless repugnant to the national Constitution, acts of Congress or a treaty of the republic, furnish the rules of decision in the national courts. (1 *U. S. St. L.* 92, § 34. 16 *Pet.* 18, 493. 6 *Ib.* 291. 6 *Wheat.* 119. 7 *How.* 40.)

This rule of interpretation is applied to the State statutes of limitation, and the decisions of their highest courts govern in our national courts, provided they do not conflict with the national Constitution, acts of Congress, or with the fundamental principles of justice and common right. (16 *Pet.* 493. 15 *How.* 423.) This limitation attaches to all State laws, and its local interpretation in the national courts. (15 *How.* 423.)

In a case depending on the construction of a will or contract, or upon the general law-merchant, or upon the American right of free navigation of navigable waters of the Union, or upon any like matter not local, the State

decisions or usage do not govern the national courts. (16 *Pet.* 1, 18, 19. 3 *How.* 476.)

## CONCURRENT JURISDICTION.

SEC. 26. Congress may confer a concurrent power on State courts, or magistrates, with the national judiciary, but the State authorities cannot be compelled by Congress to discharge such duties. (1 *How.* 306. 16 *Pet.* 622. 1 *Wheat.* 337.) Comity and the nature of our government would seem to require that no State law should interpose to prevent it.

In all cases of decisions by a State court, where the jurisdiction is conferred by Congress, an appeal lies to the Supreme Court of the United States. (1 *Kent's Com.* 6th ed. 403.)

The decisions of the last-named court, in causes within its appellate or original jurisdiction, settles the law, and binds all the State as well as national courts. (Sims' case, decided by Supreme Court of Massachusetts, 6 *Pet.* 298, 299. 16 *Ib.* 303.)

SEC. 27. A State and its tribunals may exercise concurrent common law jurisdiction with national courts, of maritime torts and transitory actions, where the common law provides a remedy, except in cases where exclusive jurisdiction is given by the constitution to the national government or its tribunals, or where a State is prohibited by it to act, or where but one government can act from the nature of the subject, and where the power is expressly given to the United States. (7 *Pet.* 248. 16 *Johns.* 331. 5 *Wheat.* 16. 18 *Johns.* 257. 4 *Wheat.* 193. 12 *Ib.* 213, 370. 1 *U. S. St. L.* 77, § 9. 6 *How.* 390.)

In case of conflict between a State law and an act of Congress, the latter prevails. (11 *Pet.* 133. 16 *Ib.* 612.)



## CONCURRENT CRIMINAL JURISDICTION.

SEC. 28. This jurisdiction sometimes arises between the State and national tribunals, and sometimes between the States and their tribunals.

If a criminal in one State commits a crime in another State of our Union, by the aid of guilty accomplices there, or by using agents there who are innocent and ignorant of the crime intended, it would seem that the guilty party might be indicted and tried in either State, though judgment in one would be a bar to a second trial in the other.

In *Adams vs. People*, (1 *Comst. N. Y. Ap. R.* 173,) it was held, that where parties out of the State of New-York made and signed a false receipt, stating the delivery of property to one of them, to be forwarded to New-York merchants to sell, and the same was sent to their innocent agent at the city of New-York, who there presented the receipt and procured the merchants to accept the drafts, which they paid, the guilty persons were liable to be indicted and tried in New-York as for a crime committed there.

Hence it seems that if a crime is planned in one country or State by parties there, and executed abroad, they are liable to be indicted where the crime is consummated.

In case a fugitive criminal from any State or territory of the Union, commits a crime in the State or territory into which he has fled for asylum, it is discretionary with the executive to surrender him at once, or to try and punish the criminal for the offence committed there, and then to deliver him up for trial for the first offence upon a requisition. (2 *Humphrey's Tenn. R.* 263.)

Upon the same principle, it would seem, that a foreign criminal, committing a crime in the United States, after

he had fled from the foreign country for the offence committed there, may be tried and punished here before his delivery, on a requisition from the foreign nation, pursuant to a treaty for extradition of such criminals. The effect of the last crime, and its prosecution and punishment generally, would be merely to delay the surrender for a time. In such cases, as soon as our criminal law had full effect, the foreign requisition must be answered in good faith.

The above rule seems to be the true rule of public law as between nations and States bound by compact or treaties of extradition.

In a suit pending in a State court, for the decision of the title to a ship, it was held by the Circuit Court of the United States, (1 *Wallace*, 311,) to be a good bar to a suit in that court, between the same parties for the same object, as both courts were so far concurrent, but that an order of sale by the State court did not divest the lien for seamen's wages, and that a proceeding in admiralty for that object might be sustained. The court held, that upon the principles of comity belonging to our system, the first arrest of a person or seizure of a thing, by authority of a State or national court, where a concurrent jurisdiction exists in the national and State tribunals, ought to give exclusive cognizance as between the same parties. (*Ib.* and *Wilkesbarre* case, 2 *Wallace's C. C. R.* 521.)

In case the national courts have exclusive jurisdiction, an arrest by State process of their officers, for legal acts done in discharge of their official duties and execution of national process and authority, may be set aside on *habeas corpus* by the appropriate national court or judge. Mr. Justice Grier so held in the *Wilkesbarre* slave case, in 1853, on petition of the arrested deputy marshals. In *Booth's* case, (21 *How.* 506,) the Supreme Court of the Union held, that where a person is arrested on legal na-

tional process, no State court or judge has any power lawfully to discharge the party from such arrest; but that the national court or officers must retain the party, and proceed to judgment and execution.

In the Wilkesbarre Fugitive Slave case, a warrant for his arrest by the national judiciary was issued to the marshal of Pennsylvania, and his deputies attempted to seize the slave, and he used force to escape, and they used necessary force to retain him and to repel his attacks, and he escaped. A State magistrate issued a warrant and arrested the deputies for such force used to execute the national process. They petitioned the Circuit Court of the United States of Pennsylvania, held in 1853, by Mr. Justice Grier, for a *habeas corpus* for their discharge, on the ground that their acts as officers were legal, and their arrest therefor by State process illegal, and so the court adjudged. The judge held substantially, that the act of Congress of March 2, 1833, authorized such *habeas corpus* to enforce the paramount national authority in the matter. (2 Wallace's C. C. R. 152.)

In 1857, a conflict of judicial action arose in the State of Ohio, between the United States marshal and his assistants and a sheriff of Ohio. Under process of the United States judicial authority, several persons were arrested for aiding a fugitive slave to escape. The sheriff and his assistants, having a State process, sought to take the prisoners by force from the United States officers, and they were forcibly resisted by the federal officers, and for these acts of duty they were arrested on State criminal process and lodged in jail, and their prisoners, on *habeas corpus* writs, were illegally discharged by the State law officers. This was a clear case of illegal and criminal obstruction of the federal authority and of its officers. The United States District Judge, Leavitt, pursuant to the act of Congress of March 2, 1833, (4 U.

S. St. L. 634, § 7,) discharged the officers from prison. The following is a portion of his opinion in the case:

“It seems clear that the deputy marshals were right, under the circumstances in this case, in resisting the attempts to rescue the prisoners from their custody. Judge Nelson, one of the justices of the Supreme Court of the United States, has stated the law on this point with great force and accuracy. While he concedes that there may be cases in which a State judge will be justified in granting a *habeas corpus* for a prisoner in confinement under United States process, he asserts that, if the process is legal, the officer having the person in charge will not be justified in surrendering that custody under any circumstances. The learned judge says: ‘In such case—that is, where the prisoner is in fact held under process issued by a federal tribunal under the constitution, or a law of the United States, or a treaty—it is the duty of an officer not to give him up, or to allow him to pass from his hands at any stage of the proceedings. He should stand upon his authority; and, if resisted, maintain it with all the power conferred upon him for that purpose.’ (1 *Blatchford’s R.* 645.) Even in cases where there is concurrent jurisdiction in the general government and a State, it is well settled, both by the adjudication of the federal and State courts, that the tribunal to which the jurisdiction first attaches shall retain it. In the case *ex parte* Jenkins, before cited, Judge Grier says: ‘Where persons and property are liable to seizure and arrest by the process of both, that which first attaches should have the preference. Any attempt of either to take them from the legal custody of the officers of the other, would be an unjustifiable exercise of its power, and lead to most deplorable consequences.’ Such is the law where there is an admitted concurrent jurisdiction. With how much greater force

does it apply where the right or power exercised is exclusive in the United States?"

In certain cases crimes may subject the offender to punishment under acts of Congress and under State laws for the same act or culpable omission. But, in these cases, a trial and judgment under the State law, in a State court, would prevent a re-trial before the national courts; and a trial and judgment before any court having jurisdiction of the case, would bar a new prosecution before all courts. The United States are specially restrained from such re-trial by Article 5th of the Amendments to the Constitution of the Union; (5 *How.* 434;) and, upon principle, a trial and judgment before a court having jurisdiction of the offence, is a bar to all future prosecutions for the same offence before any other court. In ordinary cases, comity requires that the State or national court, first arresting an offender against national and State laws, and having concurrent jurisdiction, should proceed to trial and judgment. (*Paine's C. C. R.* 620.) But, as a matter of strict right, the national offence seems to confer on the national courts a prior right; as treaties, the Constitution of the Union and acts of Congress are the supreme law of the land. (*Const. U. S.* art. 6. 5 *U. S. St. L.* p. 539.) But to give it effect, an act of Congress must so provide.

Whenever an act of Congress allows the removal of the prisoner and of the cause from the State tribunals, by *habeas corpus* or otherwise, the power of the State tribunals over criminal cases of concurrent jurisdiction is superseded. (5 *U. S. St. L.* 539.)

The District Courts of the United States have concurrent jurisdiction of offences against the United States with the federal circuit courts in all cases not capital. (5 *Ib.* 517, § 3.)

McLeod, a British subject, was arrested by the State of

New-York, charged with murder, alleged to have been committed within that State, by the accused, as one of an armed British party acting under military orders, and was brought to trial, though McLeod's act was national, avowed by his government and justified. This proceeding was not approved by the national government, and strongly objected to by the British government. The acquittal of McLeod extricated our republic from the dilemma in which it was placed; and, to prevent a similar occurrence, an act of Congress was passed authorizing a justice of the Supreme Court of the United States or district judge thereof, to issue a *habeas corpus* to supersede all State prosecutions or proceedings against foreigners domiciled in their own States, for any act ordered or sanctioned by their respective governments, giving rise to questions depending on the law of nations. (25 *Wend.* 507, 512. *Webster's Dipl. Papers*, 139, 140. 5 *U. S. St. L.* 539. 6 *Webster's Works*, 247, 253.)

Henceforth all national acts of foreign armies, navies and officers, ordered or approved by foreign nations, are within the exclusive consideration and action of our national government.

So, by a *habeas corpus*, the national judiciary may exempt national officers from illegal and interfering action of the State police or judicial tribunals in cases where national authority is exclusive, or where, by prior action, it has superseded State concurrent jurisdiction. (See the *Wilkesbarre* case, 2 *Wallace's C. C. R.* 521. *Booth's* case, 21 *How.* 500.)

The courts of the United States have held to the true rule of judicial comity, and forbid their marshals and officers from serving process on persons or property in custody of the law under State process, except in cases where Congress has specially provided for asserting the supremacy of national authority against improper inter-

ference of the State tribunals with our foreign relations, or some subject of exclusive national jurisdiction. (2 *Curtis' C. C. R.* 415. 4 *U. S. St. L.* 634, § 7.) And they have also held, that no State tribunal had any right to serve State process on persons lawfully in custody of the United States courts or officers, and that this general rule of comity was mutual, and prohibited interference of national and State officers with a prior jurisdiction of persons or property in the custody of the other. (*Ib.* 3 *Pet.* 299. 10 *Ib.* 400. 4 *How.* 4. 17 *Ib.* 471. 14 *Ib.* 52. 21 *Ib.* 518. 1 *Wallace, Jr.* 311.)

The Supreme Court of the United States, in the Booth Wisconsin case, held, that Booth being arrested by virtue of process of a national court, a State court had no power, on *habeas corpus* or otherwise, to decide that the federal court had no jurisdiction over the offence charged or person, and to liberate him; and that the order of the State court setting him free from national process was illegal. (21 *How.* 506.)

In this case the same court held, that if the clerk of a State court refused to certify the record of the State court, its judgment might be reviewed on an authenticated copy. Decided at December Term, 1858. The Supreme Court of Ohio have, in 1859, held the same in a case like Booth's, and declined to interfere.

#### HARMONY OF NATIONAL AND STATE JUDICIAL ACTION.

SEC. 29. The legislative powers of the national government are few, and are defined in the Constitution of the Union; and its judicial authority is designed to be co-extensive with its legislative. The residue or great mass of authority remains in the States, and is governed by and dependent upon State authority. (*Barry vs. Mercein*,



5 *How. R.* 115.) The judicial power of State tribunals is co-extensive with such reserved State authority.

The Constitution of the Union provides that that instrument, acts of Congress made in pursuance of it, and treaties of the Union, shall be the supreme law of the land. And the Supreme Court of the Union is the high court, vested with the authority to determine finally, all questions of national authority and law, and to annul, judicially, all State laws in conflict with rights secured by treaty, the Constitution of the Union or an act of Congress. (8 *Wheat.* 464, and *U. S. Const.*) The State courts are bound to enforce these national adjudications.

The judicial power of the Union is vested in that high court and in inferior national tribunals. As this power to its full extent is supreme, it follows that no State court, acting pursuant to a State law or otherwise, can impede or control any national tribunal or judicial officer in its or his official action, or the effect of any decision or judgment by either of them. Hence, if a national judge, pursuant to an act of Congress, grants a writ or process to bring any person before him to decide any matter, no State judge or tribunal can, by authority of any State law or otherwise, issue a *habeas corpus* or any writ, and take the arrested party from the national judicial authority or impede or control its action. (*Ante*, § 28. 5 *U. S. St. L.* 539.) Sims' case, decided by the Supreme Court of Massachusetts, in 1851, denying a writ of *habeas corpus* to bring up the fugitive slave Sims, then in custody of the marshal of the United States, under a warrant of a United States' commissioner, proceeded on the doctrine we have stated. Jack's case, (12 *Wend. R.* 311,) is to the same effect. *Kauffman vs. Oliver*, 10 *Barr. Penn. R.* 516—519. 5 *Serg. & Rawle*, 62, is to the same effect.)

A national court may, by prohibition, injunction or



other legal judicial action, restrain State officers, or parties suing in State courts, from doing acts in violation of or in conflict with a judicial power or right conferred by act of Congress, and thereby preserve the exclusive jurisdiction given by it, and protect persons acting under national authority. (2 *Story's R.* 160—162. *Ante*, § 28. 3 *Story's R.* 444, 445. 9 *Wheat.* 738. 3 *McLean's R.* 186, 191, 298. 9 *Wheat.* 738, 846, 867, 870, 871. 3 *How.* 111, 292.)

The legislative and judicial powers of the States include all the governmental authority not granted to the national government, subject to the restrictions of the State constitutions respectively. As to these reserved municipal powers, State legislative and judicial action is supreme, except so far as it may conflict with the delegated national authority and compacts. In such cases the supreme law prevails. In all others the State legislative and judicial jurisdiction is exclusive of any control by the national judiciary, and the State, by its constitutional organs, acts as an independent and sovereign State. (5 *How.* 115. 9 *Ib.* 522, 527. 8 *Ib.* 82, 493. 7 *Ib.* 283. 3 *Ib.* 720. *Sims' case*, 7 *Cushing's R.* 285. 8 *Wheat.* 1. 12 *How.* 293.)

A State legislature may grant a new trial or new hearing in suits and proceedings in the State courts, provided no vested legal right is taken away, unless prohibited by the State constitution. (10 *How.* 399, 406.)

The decisions of the Supreme Court of the Union have settled the doctrine of comity, that where a prior lawful arrest of a person, or levy on property, is made by process issued by a national judicial tribunal, no State court can, in any case, impede or oust the jurisdiction thus obtained. And that the same rule prevails in favor of State tribunals where their jurisdiction has first attached to any person or subject, except only the cases in which Congress, legislating on a matter of national jurisdiction,

shall provide for superseding State action and interference. (1 *How.* 301. 3 *Ib.* 105. 5 *Ib.* 115, 434, 435. 7 *Ib.* 624, 625. 5 *U. S. St. L.* 539. 2 *Wheat.* 1.)

SEC. 30. No State court can issue any process to any national court or officer of the United States, to control, impede or regulate them in the discharge of their duties, as the State courts have no jurisdiction. (7 *Cranch*, 279. 4 *How.* 20. 6 *Wheat.* 598. 12 *Pet.* 617.)

For the same reason, a State legislature or State court cannot annul or impede any decree or judgment of a national court, or decision of a United States commissioner or other officer. (Sims' case, 5 *Cranch*, 115. 12 *Pet.* 659. 1 *How.* 301, 306. 2 *Ib.* 16. 5 *Cranch*, 115.)

In the case of the slave Sims, decided by the Supreme Court of Massachusetts, and of Williamson by the Supreme Court of Pennsylvania, it was properly held that no State court can, by *habeas corpus* or otherwise, take away a prisoner legally in custody upon process duly issued by a national court or officer, and that no State court can review or set aside a decision of a national tribunal having jurisdiction of a matter.

The nullification law of Massachusetts, passed in 1855, to defeat in that State the execution of the fugitive slave act of Congress, is clearly unconstitutional and void. By the act of Congress against obstructions to the execution of the laws of the Union, every forcible resistance of its law officers, in the discharge of their legal duties, is a criminal offence, and punishable; and its penalties will attach to officers of State courts, as well as others resisting the process and authority of the national courts.

All attempts to impede the execution of acts of Congress, by nullifying acts of State legislatures or State courts, are illegal and unbecoming.

The Supreme Court of the United States, in Booth's case, held that no judge has any power beyond the terri-

tory of the sovereignty conferring the power, and that a State judge has no power to discharge a person held under legal process of a national court or magistrate. (21 *How.* 506.)

#### NATIONAL AND STATE POWERS.

SEC. 31. The line of division between them is plain. The general government is vested with plenary, executive, judicial and legislative authority. Its powers are authority to make war and peace; to regulate exclusively the foreign relations of our republic; to coin money; to raise money by tax, impost, excise or loan; to issue letters of marque and reprisal; to naturalize aliens by uniform laws; to enact uniform bankrupt laws; to define and punish piracies and offences against the law of nations; to grant patents and copyrights to inventors and authors; to regulate the relation of our States, subject to constitutional limitation, and other national powers; to pass laws admitting new States, and for the government of the territories of the United States; with a judicial power co-extensive with that of Congress, if Congress shall so ordain.

The States are municipal sovereignties with the great mass of reserved governmental powers, as the national government has only express powers and such incidental ones as may be necessary to execute the expressly granted authority. Prohibitions upon the States enlarge incidentally the national powers by giving exclusive authority. So, if a power can only be exercised by one government from its nature, and there is an express grant to Congress, it is exclusive. (*Ante*, § 28. 2 *How.* 65, 210. 5 *Ib.* 104, 541. 6 *Ib.* 390. 14 *Pet.* 569. 15 *Ib.* 41. 12 *Ib.* 657. 12 *Wheat.* *Const. U. S.*)

Congress can exercise only the expressly granted and

the instrumental powers necessary and proper to carry into execution all the express powers. (16 *Pet.* 537. 2 *Story on Const.* §§ 1236, 1243. 1 *Calhoun's W.* 217, 218.)

## FOREIGN DIPLOMACY.

This belongs exclusively to the national government and its specially appointed agents and ministers; neither States or individuals have any right to interfere in our foreign affairs. Interference with our foreign diplomacy by a citizen of the United States, unless authorized by the President, is made a crime against the United States. (1 *U. S. St. L.* 613.)

These principles of necessity belong to the law of nations, and it is an offence for any person to interfere with the diplomatic negotiations of his nation. The foreign relations of a nation belong to the government of the whole, and not to a State. (5 *Ib.* 532. 25 *Wend.* 519, n. 14 *Pet.* 570—573, 598, n.)

## HABEAS CORPUS.

SEC. 32. This writ may be issued to supersede State interference with persons and questions arising under the law of nations affecting the foreign relations of our republic. (*Ante*, § 28.)

In the case of *Kaine*, Chief Justice Taney and Justice Daniels concurred in the opinion of Justice Nelson; (see ch. 4, § 40;) but on the main question of jurisdiction on *habeas corpus* to review the question of the decision of the Circuit Court as to the legality of *Kaine's* detention and imprisonment, by virtue of our treaty of extradition with Great Britain, there was a division of opinion among the judges.

In the case of Jenkins and others, (2 *Wallace's C. C. R.* 521,) the Circuit Court of the United States for Pennsylvania decided that that court had power to issue a *habeas corpus* and set free from arrest, on State, criminal and other process, deputy marshals and others arrested for serving national process.

As our national law stood in 1845, writs of *habeas corpus*, *scire facias*, &c., issued out of the federal courts, were so limited as to guard against conflict with State authority except in cases affecting the paramount national authority and our foreign relations. In the case of Dorr, the Supreme Court of the Union decided, that no national court had authority to issue a *habeas corpus* to bring up Thomas W. Dorr, who had been convicted of treason against the State of Rhode Island, by its court, and sentenced to the State prison. (5 *How.* 104, 105.) The court say, neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a State. (See, also, 5 *How.* 114.)

In the case of Barry, the same court decided, that no federal court had authority to issue a *habeas corpus* on the petition of a foreigner, a father, to bring up his child, in the custody of its mother, and decide to whom the custody of the child belonged; and that the Supreme Court had neither appellate nor original jurisdiction in such cases. (2 *How.* 65. 5 *Ib.* 103.)

The court say, (5 *Ib.* 115,) that the general govern-

ment is one of limited powers. It is the design of the Constitution that the judicial power should be co-extensive with the legislative authority, but not to exceed it. These powers are comparatively few and well defined, and are exceptions to the authority residing in the States, and subject to their judicial authority; and that the great mass of authority remains in the State, and is governed by and dependent upon State power.

All questions arising out of the domestic relations are peculiarly and appropriately within the province of the State governments; and the courts will be slow in countenancing any principle, or giving any construction of the Constitution and laws that shall decree to itself this branch of local authority.

Here, then, we have in theory a perfect system of judicial harmony.

#### STATE CESSIONS AND PROHIBITIONS—TERRITORIES AND DISTRICT OF COLUMBIA—NEW STATES, &c.

SEC. 33. The power of Congress to legislate for the national territories and the District of Columbia is plenary, subject to the limitations of the Constitution of the Union. (*Const. U. S.* 14 *Pet.* 537. 5 *Ib.* 44, 542. 5 *Wheat.* 49, 317, 422. 9 *How.* 235. 1 *Wood. & Minot's R.* 84. 3 *Story on Const.* §§ 187—193.)

The same exists to legislate for the preservation and sale of the public domain. (*Ib.* and c. 6, § 14.)

The States cannot make a compact without the assent of Congress. (14 *Pet.* 570, 571; and *Const. U. S.*)

Congress can, by law, admit new States of our Union, by cession of other States or by forming them from our own territory.

## PROHIBITIONS.

States are prohibited from passing laws impairing the obligation of contracts or bills of attainder, thus securing person and property, or making compacts without the assent of Congress, or making war on each other or foreign countries, or from issuing bills of credit. (11 *P. t.* 257, 312, and *Const.* 7 *How.* 423.)

## STATE CESSIONS.

In places ceded to the United States the ordinary State laws do not prevail. (1 *Wood. & Minot's R.* 84, 85. 2 *Mason*, 60. 8 *Mass. R.* 77.) As to such ceded places, Congress in most respects has the exclusive control of them and of persons there. (*Ib.*) Over territories, forts, public vessels and establishments and persons within its jurisdiction. Congress may legislate to protect the national interests and the rights of such persons, and enforce their duties. (*Ib.*)

Judge Story, in his work on the Constitution, (vol. 2, § 1227,) says, that the States cannot take cognizance of acts done in the ceded places after cession, and that the inhabitants of those places are no longer inhabitants of the ceding State, and cannot exercise any civil or political rights under the laws of the State.

No State right of eminent domain can be exerted within such places or without them, so as in any degree to injure them or appurtenant water rights. (*Angell on Water-Courses*, 4th ed. 537, 538.)

State cessions may, and often do contain a reservation of a right to serve civil or criminal process in the ceded places, and this, as a compact, is good. (2 *Mason*, 59. 5 *Mass.* 356. 1 *Wood. & Minot's R.* 84. 1 *Kent's Com.* 429.)

By act of Congress cessions are ratified, and it is also enacted that service of civil and criminal State process may be served in certain cases, where no reservation is made in the act of cession. (1 *U. S. St. L.* 426, c. 4, § 40.)

Where this right in full is reserved or given by acts of Congress, it is a national consent to a legal extradition.

Crimes committed in ceded places are defined by acts of Congress, and triable and punishable by the national courts.

In cessions by the States, they may be more or less extensive in their reservations according to the compact. The State of New-York, in ceding the jurisdiction to the United States over land for the arsenal at Watervliet, made the grant upon condition, and reserved a concurrent jurisdiction with the United States over the ceded territory, so far that State civil process in all cases and criminal process in cases where the crime was committed without the ceded district, might be executed there, in the same manner as though such jurisdiction had not been ceded; and a further condition provided, that the cession should cease when such land was no longer used by the United States as an arsenal, &c. A further exception reserved from the cession the Erie Canal, passing through such land, and one rod on each side thereof, and the public highway passing through it. (3 *R. S. N. Y.* *Ap.* 91, 92.)

#### INCIDENTAL POWERS OF CONGRESS.

SEC. 34. Congress has a right to pass laws to execute all national powers, and to choose all constitutional means to carry them into effect. Hence, laws to exempt persons and property in the national service may be passed by Congress in its discretion. (1 *U. S. St. L.* 751, § 4, p.



595. 2 *Ib.* 674, § 21; p. 61, § 612. 5 *Ib.* 88, § 34. 4 *Ib.* 104, 107, 108, 112, § 35.)

As the national powers are supreme, and in case of conflict between a constitutional act of Congress and a State law or authority, the former prevails, no State law or authority can, upon principle, impede the execution of an act of Congress over military and naval affairs, or over the mails. Hence, it would seem, that all persons and property actually in the military, naval or mail service of the United States, are exempt from State law and authority, except in case of municipal crimes and offences, when, from necessity, the criminals must be arrested, though a temporary detention of the mail, or other obstruction of the public service might arise. It would seem that a mail-carrier, his horse or horses and carriage, a locomotive and train actually in use transporting the mail, are exempt from the action of State law and process, except in criminal cases. (*Ib.* and 1 *Kent's Com.* 410, 411. 1 *Peters' C. C. R.* 390. 2 *Watts & Serg.* 163. 3 *Hall's Law Jour.* 128, and *post.*)

#### MAIL EXEMPTIONS.

Postmasters, post riders and drivers of mail stages are exempt from militia and jury duty and fines. (4 *U. S. St. L.* 112, § 35.)

None but white persons can carry the mail. By the act of 1836, (5 *Ib.* 88, § 34,) postmasters, and clerks engaged in their offices, are exempt from jury and militia duty and fines on that account.

#### EXEMPTION OF SOLDIERS, SEAMEN, &c.

An act of Congress provides, "That no non-commissioned officer, musician or private shall be arrested, or

subject to arrest for any debt, or to be taken in execution for any debt under the sum of twenty dollars, contracted before enlistment, nor for any debt contracted after enlistment." (2 *U. S. St. L.* 136, § 23.) The act of 1799, (1 *Ib.* p. 751, § 4,) provides a general exemption of such persons from all arrest for debt or contract, and extends such exemption to the militia as well as others in the service of the United States, and to artificers. So that the act of 1799 is merely modified as to an indebtedness exceeding twenty dollars, contracted before enlistment, by the persons above named. (2 *Ib.* p. 137, § 29.)

An act of 1800, (2 *Ib.* 62, § 4,) enacts that all artificers and workmen, who are or shall be employed in United States armories, shall, during their term of service, be exempt from military and jury duty.

An act of 1798, (1 *Ib.* 595, § 5,) enacts that non-commissioned officers, seamen, musicians and marines enlisted, or to be so, in the United States naval service, as well as all other non-commissioned officers and musicians in such service, shall be exempt from arrest for any debt or contract during their term of service.

#### LEGISLATIVE EXEMPTIONS.

Public considerations have secured members of Congress and of our State legislatures from arrest while those bodies are sitting in all cases, except treason, felony and breach of the peace, and while they are going to and returning from such sessions. The sixth section of article first of our national Constitution confers such privilege on members of Congress, and an exemption from being called in question for any speech or debate in Congress, and from being questioned in any other place as to the same. (1 *Calhoun's W.* 217. 1 *Story on the Const.* § 859.)

The same principles are declared by the State constitutions, and they may be considered as part of American public law. (*U. S. Trials*, 253, 260, 316, 336.)

The above exemption is confined to debates, reports and official acts in the course of his duty. (1 *Story on Const.* § 866.) So, if a member publish, unofficially, a libellous speech or report, it is not privileged. (*Ib.*)

#### LEGISLATIVE PROTECTION.

Congress, State legislatures and all legislative bodies have the power of self-protection, and may punish contempts, subject to limitations prescribed by law. It is necessary to their existence. (1 *U. S. St. L.* 83, § 17, 6 *Wheat.* 225. 2 *Story on Const.* 299, 300.)

An attempt was made during the presidency of John Adams, to protect the President and certain officers of government from libels, an act of Congress made them indictable and punishable by the national courts. Some convictions took place, but the act was repealed during the presidency of Thomas Jefferson, and its effects removed as far as the power of the executive extended. President Jefferson and his party considered the act unconstitutional, as Congress was prohibited from passing any law on the subject. (1 *Calhoun's W.* 359.) After forty years from the conviction of Lyon, Congress directed the fine imposed under the law in behalf of the United States on him, to be refunded to his heirs. (*U. S. State Trials*, 344, 719.) Thus Congress declared against the commonly called Sedition Act, and the violent conduct and arbitrary decisions of certain judges, who seem to have been misled by their party predilections, and erroneously, though innocently, gave their sanction to a law now

deemed incompatible with our national Constitution and with the freedom of American citizens.

#### IMPRISONMENT FOR DEBT.

Selling debtors and their families for debts into slavery, as well as prisoners of war, is a barbarous custom, originating in heathenism, and wholly inconsistent with the benign spirit of the gospel. Our national and State legislatures have been gradually removing the person of debtors from the grasp of exacting and severe creditors, and allowing execution only against the property of debtors. Honest debtors are now exempt from imprisonment for debt under process of our national courts, in most cases, upon surrender of their property; and this now prevails in most, and will soon be the rule in all of our States. (5 *U. S. St. L.* 321, 410, 629. *Conklin's Tr. on the U. S. Courts*, 477—479, 480—482.)

Defaulters, speculators and wrong-doers are criminally and penally punished by acts of Congress and by State laws.

This exemption from imprisonment of honest debtors is one of the original improvements of American jurisprudence, produced by the conjoint influence of Christianity and republican institutions.

#### NATIONAL LAW.

SEC. 35. The laws of the United States are recorded in the federal Constitution, treaties of the national government and in acts of Congress. The Indian treaties and compacts between the general government and the States form part of the national law. American law, declaratory evidences of which is found in concurring acts of Congress and in the Constitutions of the States, may be deemed part of the national public law. But there is no

common law of the United States. In the case of *Pennsylvania vs. The Wheeling Bridge Companies*, (13 *How.* 519,) the Supreme Court of the United States say: "It is admitted that the federal courts have no jurisdiction of common law offences, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction." But the court added: "And it is admitted that the case under consideration is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia." (See, also, *Wheaton et al. vs. Peters*, 8 *Peters*, 658.) In that case the court say: "It is clear there can be no common law of the United States." (See, also, 9 *How.* 618. 7 *Cranch*, 32. 1 *Kent's Com.* ed. 1848, pp. 339—341. 1 *Wood. & Minot's C. C. R.* 401.)

Commercial law, or the law-merchant, is held by Blackstone to be a part of the law of nations. Sandford, V. Ch., in *Sanford vs. The Long Island R. R. Co.*, (5 *Sandf. Ch. R.* 188,) says: "The decisions of our highest national tribunal, upon questions of general commercial law, we cannot but think ought to be regarded throughout the Union as authoritative and controlling. Commercial law is not local or sectional, but national in its character, and its uniformity, therefore, a national concern, and it is only by attributing a paramount authority to the highest court of national jurisdiction that this desirable uniformity can be attained or preserved.

So far as the national Constitution, or any treaty or constitutional act of Congress shall have adopted, or may adopt, portions of the common law, civil law or other foreign law, it has been and may be part of and incorporated in our code of national law. (*Ib.* Ch. 8, last sect.; ch. 5, §§ 5, 25. 16 *Pet.* 25, 65. 1 *How.* 277—279. 15 *Pet.* 125.)

By the Constitution of the Union the national judicial

power is extended to all cases in law and equity arising within the limit of national authority. In the *Wheeling Bridge* case, (*Ante*, § 5, and 12 *How.* 443,) and in the case of *Georgetown vs. The Canal Co.*, (12 *Pet.* 94,) the Supreme Court of the United States held, that the Constitution, and acts of Congress allowing suits in equity where no adequate remedy at law existed, authorized the national courts, vested with equity powers, to administer the equity system of the High Court of Chancery of England, that being adopted as part of the national code in all cases to which it was applicable. The national equity law is uniform. (13 *How.* 268.)

Article 7th of the Constitution adopts the common law jury trial in cases at law where that trial had been used, and the common law rule as to the binding effect of the verdict of the jury, and forbids a re-examination of the facts by the national courts except according to the rules of the common law.

Our act of Congress makes the rules of the common law part of our Chinese and Turko-American codes. (See last sect. ch. 8. 9 *U. S. St. L.* 302.)

When our Constitution, or any act of Congress or treaty, employs a civil or common law term, such law, from which it is adopted, may be resorted to to define its meaning, unless its American signification, more or less extensive, had become fixed at the time of its adoption, or its foreign meaning would be incompatible with our system of law. (*Ib.* 1 *How.* 77—79.)

Our American public and private international law forms a part of American jurisprudence. (*Ante*, ch. 5, § 39 ; ch. 2, § 19.) So does the law of nations as adopted and expounded by our Presidents and the Supreme Court of the United States.

## STATE LAW.

Each State of our Union has its own system of law and jurisprudence as a municipal sovereignty. Its law is composed of our treaties, the Constitution of the United States, and acts of Congress passed in pursuance thereof, the State constitution and its statute laws, and such portions of the common, civil or other foreign law, Spanish, French, Roman or Dutch, as the respective States shall have incorporated in their respective codes, not inconsistent with our treaties, the national Constitution or such acts of Congress.

Our treaties, national Constitution and such acts of Congress are the supreme law of the land in every State, and all other State law must be subordinate thereto. The treaties cease to be part of the municipal law of our States and Union when repealed by Congress.

American jurisprudence has drawn largely upon the English, French, Spanish and Roman law, though the basis of American law is original and republican.

In determining what the common law is in States where the common law of England has been adopted by a State of our Union, English statutes modifying it may be considered.

Mr. Justice Harris, of the Supreme Court of New-York, an able jurist, in the case of *The People vs. Van Rensselaer*, decided in 1852, held that the statute of *quia emptores*, enacted by the English Parliament in 1289, declaring that upon all sales or grants of lands the grantee should hold, not of his immediate grantor, but of the chief lord of the fee, of whom the grantor himself held, changed the common law before the colonies were planted in America, and that our ancestors adopted it as it existed at their emigration. He held that the object of the stat-

ute was to modify the common law and prohibit the granting of manors, such as the royal governors of New-York granted to certain Van Rensselaers, in trust, for their family, and that they were illegal and void. The judge declared the statute applicable to the colonies, and that, under such circumstances, an English statute, existing at the settlement of the colony, was to be deemed part of its law. And he cited and relied on *Patterson vs. Winn*, (5 *Pet.* 241. 4 *Paige*, 198. 1 *Kent's Com.* 473.)

The same principle must apply to those of our States that have adopted the civil law, as it existed and was modified in the countries from which their law was derived.

Adoptions of the common and civil law, after a colony was planted, may have been by usage or by royal order consented to, or by statute of a colony.

SEC. 35. Our American public and private international law is composed in part of a written code, enacted in the form of a national constitution and acts of Congress, and State constitutions and State laws, and in part of the law of national comity, arising from the relations of the national sovereignty to the State municipal sovereignties, and from the equality of the latter among themselves and a common union in one nation. These constitutions and laws do not enact the law of international and inter-state comity, but merely recognise it by enforcing it in a few particular cases.

This law seems to rest on the golden rule of the gospel, and, as the fruit of Christian civilization, to belong, of necessity, to American jurisprudence, as God's appointed regulator of the rights and duties of all national and State sovereignties. Treaties, constitutions and laws merely recognise and regulate it in certain respects, but its true basis is the command of Jehovah to nations and



States, as well as to individuals, "Do unto others as you would they should do unto you." (*Post*, § 39.)

## SUPREMACY OF LAW.

The laws of the respective States and those of the United States are held in all American courts supreme within their respective constitutional limits. Hence, it is a principle of American law, that all contracts that contravene such laws in their positive provisions, their spirit or policy, are illegal and void. Hence all agreements, the object of which is to restrict, embarrass or disturb the regular and constitutional action of the executive, legislative or judicial departments of any State, or of the national government, are illegal and void. (15 *Wend.* 45, 412. 4 *Comst. N. Y. Ap. R.* 456, 457. 5 *Johns. R.* 334. 15 *Barb. R.* 541. 20 *Wend.* 27.)

In *Armstrong vs. Toler*, (11 *Wheat.* 261,) the Supreme Court of the United States held the settled rule to be, that all contracts growing immediately out of, and connected with an illegal or immoral act, will be held void, and no court will assist their execution.

In *Bartle vs. Coleman*, (4 *Pet.* 187, 188,) where a public officer made a contract to build a fort with a person, and agreed with him to have one-third of the profits, and another person contracted to aid in this fraud as partner or agent, the same court held the contract illegal and void as to all the said parties, and that neither could maintain an action, as it was contrary to public policy and sound morals. (See, also, 4 *Wheat.* 204, 207, 436. 8 *Cowen's R.* 728. 5 *Hill*, 52.)

The gospel morals are recognised by all the courts of Christian States and nations, and contracts for immoral objects will be held by them illegal and void. (*Ib.*)

## STATUTES OF LIMITATIONS AND RECORDING LAWS.

SEC. 36. It is well settled that States may pass laws for recording deeds, mortgages and other documents, and make void all such, though older, as shall not be recorded; and that such law may apply to such deeds, &c., as existed at the passage of the law, as well as to those executed afterwards, if the persons holding title under such deeds were able to comply with the recording act. But it is otherwise where the deed has been destroyed by the passage of the act requiring it to be recorded, or where from any other cause a compliance with the law is impracticable. (See *Cranch vs. Briggs*, 6 *Paige's Ch. R.* 323.) A State may, also, legally pass statutes of limitation relating to existing as well as future contracts, transactions, titles and causes of action. If an opportunity is allowed by such laws to the party to be affected to comply with any such law, it is not a law impairing the obligation of contracts. (3 *McLean's C. C. R.* 569. *Cox's U. S. Digest*, p. 467, § 79. 9 *How.* 522, 527, 529.) In *Phelan vs. Virginia*, (8 *How.* 168,) the Supreme Court of the United States so decided, and in their opinion say: That it has been often decided by this court, that the prohibition of the Constitution now under consideration, by which State legislatures are restrained from passing any law impairing the obligation of contracts, does not extend to all legislation about contracts. They may pass recording acts, by which an elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time; and this whether the deed be dated before or after the act. Acts of limitation, also, giving peace and confidence to the actual possessor of the soil, and refusing the aid of courts of justice in the enforcement of contracts after a certain time, have received the sanction of this court.

Such acts may be said to effect a complete divesture, or even transfer of right; yet, as reasons of sound policy have led to their adoption, their validity cannot be questioned. States of our Union may pass statutes of limitation according to their discretion, subject to the limitation of the national and State constitutions. (9 *How.* 522, 529.)

A statute of limitations may perfect a title to personal property in one State of our Union by a fixed period of possession or other appropriation, so that a transfer of such perfect title will be, by comity, held good in other States. (*Shelby vs. Grey*, 11 *Wheat.* 369, 371, 372.) In such case there might be a divesting of the title of the true owner, and its transfer by law and his negligence. Still the law is valid; the title is perfect, and there is no violation of any constitutional prohibition. (*Ante*, c. 5.)

In *Harpending vs. The Dutch Church*, (16 *Pet.* 492,) the Supreme Court of the United States decided that, where a State statute had run on realty in favor of the holders of it, they had a title as undoubted as if they had produced a deed in fee simple from the true owner, dated at the end of the period limited by law; and that all inquiry into their title or its incidents was as effectually cut off. There then would be a legal transfer of realty by lapse of time and an adverse possession ripened into a right, and yet no violation of the constitutional inhibition against divesting a man of his property without due process of law, or impairing the obligation of contracts.

The policy of the law makes the prescribed possession undisturbed by suit, or the possession of the claimant conclusive evidence of title in the holders. (11 *Wheat.* 370—372. 16 *Pet.* 492. 8 *How.* 168, 292. 8 *Cranch*, 72.)

The effect of a statute of limitations, when it applies to a case and has fully run, makes a title in the ad-

verse possessor as perfect as could be conveyed by an absolute deed of the true owner. (16 *Pet.* 492.) Hence, where such adverse possessory title becomes complete by lapse of time, all foreign and domestic tribunals ought so to adjudge as to personalty as well as realty.

Statutes of limitations proceed on principles of public policy. (1 *How. U. S. R.* 103, 104. 8 *Ib.* 221.)

The expiration of the period of limitation is, in legal contemplation, evidence of the satisfaction and settlement of contracts, transactions and causes of action. (*Ib.* 4 *Wheat.* 207. New-York Code, Sess. Laws, 1849, p. 638, § 110.)

To renew or continue a contract beyond the statute period of limitation, a writing to that effect, signed by the party to be charged, is necessary by the New-York Code.

By the law of nations, and by the private international law of our Union, foreign transactions and contracts, when litigated in any national or State court, and which are not against our law and policy, or that of the *lex fori*, will be adjudicated on the merits, according to the rights of the parties as they existed in the country of their origin, and upon the same principles that its courts would decide the matter in controversy. (1 *How.* 28. *Webster vs. Massey*, 2 *Wash. C. C. R.* 157. *Cox's Dig.* 455, § 39. 11 *Wheat.* 371, 372. In the Circuit Court of Pennsylvania, *Conframp vs. Burrel*, 4 *Dall.* 419.)

When a bill of exchange is drawn by a merchant of one country upon a merchant in another, and payable in such foreign country, it may be paid in the lawful currency of the country where it is payable, unless the jury find that the parties, intended payment should be made in gold or silver. This is the rule as held by the Circuit Court of the United States for Pennsylvania. (4 *Dall.* 327, 328.)

Where, however, a party removing from one State of our Union to another State before the law of the former

has discharged a judgment or contract, so that the law which created had not annulled the obligation, if he is sued there, he may plead the statute of limitations of the *lex fori*; and if the suit is barred by that law, the remedy is gone forever, and ought to be so held in all courts of all countries. (13 *Pet.* 312.)

Among the States of our Union the above principles of private international law, by comity and by the nature of our system of government, are obligatory. They are also rules of public law, applicable to nations when they entertain jurisdiction of controversies among foreigners respecting transitory actions. (See above cited cases.) Some nations, as France, with a few exceptions, refuse in their courts to take cognizance of suits between foreigners relating to personal rights and interests. (*Story's Conf. L.* 2d ed. 453, § 542.)

#### PROOF AND PRESUMPTION OF FOREIGN LAW.

SEC. 37. In England and the States of our Union, where the common law forms the basis of local jurisprudence, the law considers all personal actions, whether *ex contractu* or *ex delicto*, wherever the cause of action arose, as transitory, and as governed by the law of the State or nation before the courts of which the parties are litigant, unless one of the parties shall allege and prove a foreign law, that, by national comity, ought to govern the case. (*Hoffman vs. Carow*, in Court of Errors of New-York, 22 *Wend.* 323. 1 *Seld. N. Y. R.* 447. 3 *Barb. S. C. R.* 20, 29. 2 *Hill's R.* 201, 202.) The law of such States and nations is presumed to be the same, unless one of the parties shall aver and prove the contrary.

In the States of our Union the law of the *lex fori* is applicable to all transitory actions, unless a foreign law is averred and proved to be properly applicable to the case

by national comity. (*Bank of Augusta vs. Earle*, 13 *Pet.* 519, 589. 22 *Wend.* 323. 2 *Hill's R.* 201, 202. 3 *Barb. S. C. R.* 29.) Hence ignorance of a foreign law is ignorance of a fact. (8 *Ib.* 238, 239. 9 *Pick.* 112 3 *Shepley*, 4, 5.)

In suits in our national and State courts, where the principles of the general commercial law are involved, arising out of contracts made in foreign countries, or a State other than that where the matter is litigated, the particular exposition of that law by the courts of the *lex loci contractus* will not be deemed to be part of or to govern the contract, if adjudged to be in conflict with the well-settled principles of the law-merchant, as generally expounded by enlightened tribunals of other States and countries. (*Swift vs. Tyson*, 16 *Pet.* 18—22.)

The same rule must be applicable to all contracts and transactions in any State of our Union, whether the common or civil law forms the basis of its jurisprudence, where the matter is litigated in a court of another State, or before a national court. The general principles of the common and civil law must be judged of by courts, before which parties litigate as to foreign transactions, by the expositions of that law by the decisions of common and civil law tribunals respectively of different countries, and not by any particular decisions of the courts of the country of the transaction, which conflict with the general tenor of judicial authority.

While local courts, therefore, in all countries, as well as in the States of our Union, decide authoritatively and conclusively all questions relative to immovables, realty and local statute law, and general customs having the force of local law, so that, by national comity, these are to be regarded by foreign courts as evidence of that law, all matters litigated in foreign courts, where the principles of the common or civil law are involved, ought to be

decided by the principles of such law as settled by the highest authority.

The presumption that a foreign law, in the absence of proof, is like the law of the *lex fori*, must be confined to cases depending on the law of nature, on the common or civil law, where the two countries have the civil or common law in common; and the rule cannot apply to statute laws, or rights founded on them; nor can any such rule apply where the systems of jurisprudence are essentially different.

Hence, citizens of one State or country are not deemed to be charged with knowledge of foreign law. And this is the rule of our private international law as applied to the States of our Union.

It is a settled principle of public law, that foreign laws must be averred in pleading and proved as facts, as the *lex fori* is presumed to know only the law of the country whose tribunal has jurisdiction of an action. (1 *Selden's N. Y. R.* 447, 451, 452. 5 *Ib.* 53, 62. 10 *Wend.* 75. 1 *Kernan's R.* 439. 11 *Paige's Ch. R.* 398. *Story's Conf. L.* 2d.ed. 638, §§ 444, 649. 1 *U. S. St. L.* 122. 2 *Ib.* 298.)

This doctrine applies to the States of our Union, the District of Columbia and organized territories. (*Ib.*)

Hence, where a suit is tried in one country depending on the law of another, if that is mistaken, and an erroneous judgment is given, and a new suit is instituted in the country whose laws have been misapplied, the former judgment is not regarded, as true comity requires that foreign law should be administered as recorded in its statutes, or as adjudged by the highest tribunals of the *lex loci*.

Hence, where there are two administrations granted in different countries, the tribunals of each regulate the distribution of the assets found there agreeable to the *lex*



*loci*, and they do not submit their succession to be adjudged by a foreign tribunal, as national comity does not call for the displacement of *lex loci*, essential to the security of its own citizens. The State or sovereignty in whose territory assets of deceased persons may be found may control and distribute them for the protection of their own citizens, creditors, legatees and parties entitled to succession. In case of necessity, and to prevent failure of justice, a foreign tribunal may take jurisdiction of foreign assignees, trustees, executors and administrators, and, as an exception to the general rule, may compel them to account, and pay over to parties entitled, the funds improperly and inequitably held in their hands. In such case, where the foreign law is a material fact, it must be averred in pleading and duly proved, to entitle the party injured to relief.

In these judicial investigations the whole history of the common and civil law become objects of inquiry. Cicero, Grotius, Bacon, Coke, Hale, Mansfield, Blackstone, Domat and the leading publicists and judges of Europe became the expounders of the general principles of those laws. In our own country, among the highly-honored dead, whose legal learning, great ability and integrity have largely contributed to build up our improved system of American jurisprudence, and who are our expositors of law, we would name, with reverent admiration, John Marshall, John Jay, Ambrose Spencer, Theophilus Parsons, James Gould, James Kent, Alexander Hamilton, Edward Livingston, James Madison, William Pinckney, Joseph Story, William Johnson, William Wirt, Daniel Webster, Henry Clay, John Q. Adams, Henry Wheaton, and a long line of other eminent judges and civilians. In the decisions of our national and State courts, our acts of Congress, and in the treatises of our learned civilians and lawyers, we are to look for American expositions of the civil, com-



mon and public law. Of the able civilians, judges and chancellors, now living, who have largely contributed to the advancement of American jurisprudence, we cannot speak without pronouncing in anticipation the grateful judgment of posterity.

#### USAGE AND CONSTITUTIONAL CONSTRUCTION.

SEC. 38. The Supreme Court of the Union, in *Driscoll vs. Kentucky*, (11 *Pet.* 317,) held that a uniform course of action, involving the right to the exercise of important power by the State governments for half a century, and this without question, was satisfactory evidence that the power was rightfully exercised. Upon the same principle, a congressional course of legislation, generally acquiesced in for a long period, would practically settle the construction of the Constitution in accordance with the national legislation. (16 *Pet.* 542.) In this way the construction and extent of the power of Congress over commerce has been settled by many acts passed at different times during half a century. And, in the same way, the meaning of the clause empowering Congress to pass all laws necessary and proper to carry into effect the powers specifically granted, has become fixed. It is now practically settled, that Congress is the sole judge of what constitutional means are necessary and proper to give effect to those powers. (4 *Wheat.* 412, 413, 419, 420, 421, 424, c. 5, § 31.)

By long-continued practice, and by decisions of the Supreme Court of the Union, it has become settled that the government of the Union, clothed with national powers, and the States possessing plenary municipal authority, are all of them sovereign and supreme within their respective constitutional limits. (4 *Wheat.* 410. 1 *Pet.* 542, 543.)

By the action of the republic in adding Louisiana, the Floridas and Texas to the Union, by treaties and by law passed by Congress, that mode of acquiring territory and States must now be deemed constitutional. (11 *Pet.* 317.)

By decisions of the Supreme Court of the Union, which has the sole power to finally decide, the following rules of construction are also settled :

1. Whenever the terms in which a power is granted to Congress require that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been forbidden to act. (16 *Pet.* 622.)

In such cases there is a direct repugnance and incompatibility in the exercise of the power by the States. (5 *Wheat.* 49.)

2. The power of Congress is exclusive where the States are expressly prohibited to pass laws (11 *Pet.* 317) of a particular character.

3. Such power is exclusive where an exclusive jurisdiction or power is granted in terms ; as the power to establish a uniform rule of naturalization and bankruptcy, and the delegation of admiralty and maritime jurisdiction to the federal courts. (5 *Wheat.* 49.)

4. The States, or the people thereof, retain all the powers of government not granted to the national government. (11 *Pet.* 257, 316, 317. *Const. U. S.* art. 10.)

5. The national and State municipal governments are each sovereign and supreme within their respective constitutional limits. (4 *Wheat.* 410.)

6. General limitations of power, where the States are not expressly named and included ; are to be deemed restrictions on the powers of the national government, intended to prevent interference with the States, and not restrictions on the States in reference to their own citizens. (7 *Pet.* 247. 5 *How.* 434.)

7. As the Constitution of the Union gives a paramount authority, to the extent of the national powers conferred upon the general government by the people of the States, it prohibits, by necessary implication, the States, or their officers, agents and tribunals from impeding or in any manner interfering with the national government, its officers and agents, or with its judicial tribunals, in executing its authority. (1 *Kent's Com.* 4th ed. 328, 409—413. 4 *Pet.* 563, 564. 16 *Ib.* 449. 4 *Wheat.* 316. 9 *Ib.* 738. 2 *How.* 16. 1 *Ib.* 301. 5 *Cranch*, 115, § 6. 2 *Wheat.* 1. 6 *Ib.* 598. 12 *Pet.* 751. 6 *Wheat.* 447, 598.)

A State law cannot suspend or discharge the obligation of a contract, though made and to be performed within such State, if the contract is with a citizen of another State. (10 *Law R. N. S.* 606. 14 *Pet.* 67. 18 *How. U. S. R.* 503. 2 *Curtis' C. C. R.* 604.)

The Constitution of the Union having conferred on the national courts jurisdiction in such cases, a State law cannot control or in any manner affect the action of the national tribunals.

#### NATIONAL COMITY.

SEC. 39. The doctrines of national comity are applicable as between the States of our Union, and between the District of Columbia or any organized territory and States respectively.

The Supreme Court of the Union, in the case of the *Bank of Augusta vs. Earle*, (13 *Pet.* 590,) held that the principles of comity were applicable as between the States of our Union and among nations. The court held, in that case, (p. 592,) that Congress, by the Deposit Act, recognised this doctrine of comity in its application to banks. The doctrine of comity has been often recog-

nised. (4 *How.* 16. 4 *Johns. Ch. R.* 372. 7 *Wend.* 553. 6 *Hill*, 529. 6 *Cow.* 46. 14 *Pet.* 129. *Angell & Ames on Corporations*, 3d Boston ed. 374—377.)

Though comity among the States of our Union does not require the enforcement of the penal and disqualifying statutes of other States, if a penal action is brought duly and judgment recorded on personal service of process, in a local tribunal where the transaction arose, and an action is brought in another State on such judgment in favor of such foreign State or others, plaintiffs in the judgment, the cause of action is merged in the judgment, and an action thereon may be sustained in such foreign State. And comity requires the enforcement of such judgment, as the local cause of action is merged therein. (11 *Pick. Mass. R.* 389.)

The Supreme Court of Missouri held, in *The King of Prussia vs. Knepper's Ad.*, that a foreign sovereign may sue in the courts of that State, and that where, by the law of his kingdom, he has refunded money stolen from the post-office, and thereby become vested with and subrogated to the rights of the loser, he may sue the wrongdoer and recover for money so paid, in the courts of Missouri. This decision is founded on national comity.

## CORPORATIONS.

The Supreme Court of the Union have settled that a corporation is an artificial being, invisible and intangible, and existing only in contemplation of law; that its powers are those declared by the statutes creating it, and that it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. That a corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law, and by

force of the law ; when that law ceases to operate, and is no longer obligatory, that the corporation can have no existence ; that it must dwell in the place of its creation, and cannot migrate to another sovereignty. But a corporation may act and contract in any foreign nation, and much more in any other State of our Union, if it is acknowledged and recognised by the State or nation where the dealing takes place ; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed. Every power, however, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised. And a corporation can make no valid contract without the sanction, express or implied, of such sovereignty, unless a case should be presented in which the right claimed by the corporation should appear to be secured by the Constitution of the United States. (14 *Pet.* 129, 130. 13 *Ib.* 587. 12 *Wheat.* 64. 4 *Ib.* 316. 9 *Ib.* 738. *Angell & Ames on Corp.* 3d Boston ed. 121—123. 4 *How.* 16.) .

If the charter of a corporation authorizes it to loan on mortgage upon lands lying out of the State creating it, or to purchase and hold such lands in other States, the corporation may exert those powers, if not prohibited by the law of the State where such realty is situated. (14 *Pet.* 130. 4 *Johns. Ch. R.* 372.)

Where a State, by law, declares that a purchase of lands by any corporation, foreign or domestic, shall subject the lands to forfeiture to the State by *escheat*, the corporation may take lands by purchase and hold until the State shall enforce the *escheat*. (14 *Pet.* 131, 137. *Binney*, 313. *Angell & Ames on Corp.* 122, 123.)

A corporation is not, however, a citizen of a State within the meaning of Article 4, section 2, which says, that the citizens of each State shall be entitled to all pri-

privileges and immunities of citizens in the several States. (14 *Pet.* 60.)

Comity requires that the States of our Union should, as far as possible, reciprocate rights and advantages; but if any State creates any corporation with power to act or contract in other States, their legislatures may judge whether they will permit such corporation to exert its powers in their respective States, and to what extent; provided that no law be passed infringing a right secured by the Constitution of the United States.

But comity does not require a State to enforce contracts or give effect to transactions in violation of its own law and policy. (3 *Wheat.* 146. 13 *Pet.* 589. 6 *Hill*, 528. 13 *Pet.* 65. *Story's Conf. L.* 204, § 246; 2d ed. §§ 247—249; p. 212, § 258, (2;) p. 214, § 259, (3;) 259 a.)

If a State authorize, by law, a corporation or all its citizens to loan and borrow money at ten per cent., and a note or contract be made there payable in a State where all loans exceeding six or seven per cent. are illegal and the contracts void, the tribunals of the State where payment or performance is agreed to be made is not bound by comity to enforce them. But the tribunals of the State whose law allows them, by the *lex loci contractus*, would enforce them. (6 *Paige's Ch. R.* 627. 6 *Webster's Works*, 117, 119.)

Mr. Webster's views on national comity will be found in his *Works* last referred to.

A corporation of a State is not a citizen within the meaning of the Constitution of the United States. (Sect. 1, art. 1.) It is a creation of the State, and is an artificial body, with such powers of action within the State as its laws confer upon it, but as legislation is not extra-territorial, such companies act in other States only by their comity. The *lex loci* regulates the extent of this comity,

and all foreign corporations can transact business in foreign States only to the extent, in the mode and upon the conditions prescribed by the municipal law of the place of action. (20 *Barb. R.* 80.)

In *Pearce vs. The Consolidated Madison and Indiana Rail-Road Company and the Peru and Indianapolis Rail-Road Company*, (21 *How.* 442,) the Supreme Court of the United States held, that these roads having united by the agreement of the companies without legislative authority, and having bought a steamer as part of the plan, and given the note sued on, as by the new company, for the price, the whole contract and note were illegal and void, and the holders of the note were bound to take notice of the statutes creating these separate corporations, and that no corporation can apply its funds to any other objects than those specified in its charter, and that a Court of Chancery will enjoin against a misapplication of the corporate funds, and the English cases were cited and approved. The court held, that corporations are artificial beings, having those powers only that the statutes creating them confer specially or by necessary implication. (See, to the same effect, 41 *Eng. Ch. R.* 9 *Hare*, 305.)

The same court held, in the *Philadelphia and Baltimore Rail-Road Company vs. Quigley*, (21 *How.* 202, 210, 217,) that a corporation, as a rail-road or other corporate body, is liable for acts done by the agents of the corporation, *in contractu* or *in delicto*, in the course of its business, and of their employment, and an individual is responsible under similar circumstances. That corporations might thus be liable for libel, assault and battery, for damages by collisions of rail-road cars and steamboats, and for trespass *quare clausum fregit*. And the court cite in support of this position, 9 *Serg. & R.* 94. 4 *Mann. & G.* 452. 4 *Gray's Mass. R.* 465. 6 *Ex. Ch.* 314. 14 *How.* 465. 19 *Ib.* 543. 34 *Law & Eq. R.* 14.



11 *Wheat*. 59. The court (p. 211) say: "The case of *National Exchange Company of Glasgow vs. Drew*, (2 *Macqueen's H. of L. Cas.* 103,) was that of a company in failing circumstances, whose managers sought to appreciate its stock by a fraudulent representation to the company, and a publication of the report as adopted by it, that its affairs were prosperous. Two of the stockholders were induced to borrow money from the company to invest in its stock. The question in the cause was, whether the company was responsible for the fraud;" and the court add, that the false representations of the agents were the act of the company as well as the individual *torts* of the managers; that the adoption of the report made it the company's act, and that the representation having been used, in dealing with third persons, the company must bear and pay the loss of the party trusting to the representations. The court approved this decision. (See, also, 22 *Missouri R.* 85. 26 *Eng. Law & Eq. R.* 536.)

It has been settled by the Queen's Bench in England, in January, 1859, by the unanimous decision of the court, in *Scott and Robinson vs. Dixon*, Manager of the Liverpool Borough Bank, that a report made to the shareholders of the bank by Dixon that its capital was intact, and that there was a surplus to divide, when he knew that a portion of its capital was lost and that there was no surplus, which report, coming to the knowledge of plaintiffs, induced them to buy stock in the bank, which they wholly lost by its failure, made Dixon liable to plaintiffs for their loss. (*The Jurist* of Lond. of Nov. 27, 1858, N. S. vol. 4, pp. 1068, 1069. *Lond. Times* of January 29, 1859.)

The Superior Court of the city of New-York, in *Cross vs. Sackett*, (6 *Abbott's Pr. R.* 247, 248,) and the case of *Mead vs. Mali*, (15 *How. N. Y. R.* 347,) held the same principle of common law, common honesty and common



sense, that the directors and officers of all corporations and associations are personally liable for all false representations of the capital and condition of their companies that they know to be false, or that they do not know to be true, and must make good the loss of any one coming to a knowledge of such false reports or statements, and being injured thereby.

The law imputes to directors a knowledge of the affairs, capital and condition of their companies, as it is part of their official duties. (3 *Kernan's N. Y. Ap. R.* 114. 3 *Comst. N. Y. Ap. R.* 156. 4 *Selden's N. Y. Ap. R.* 312.) In *Robertson vs. Smith*, (3 *Paige's Ch. R.* 231,) Chancellor Walworth held directors liable for violation of their duties as trustees. (See, to same effect, 5 *Ib.* 612. 3 *Louisiana R.* 568.) The House of Lords held the above doctrines in *National Exchange Company vs. Drew*, (32 *Eng. L. & Eq. R.* 1, 4—10.)

In England and in this country it is settled, that the directors of a company or a committee, or any one of them, can make no private contracts for his or their advantage, in reference to the subject-matter of the plan of association, as declared to the public or associates, and that all such contracts, and all gains gotten by any such surreptitious proceedings, are in equity held to be in trust for the benefit of the corporation or association, and such body may recover the same from the wrong-doer. (*Beck vs. Kantorowicz*, *Kalb vs. Same*, *Kantorowicz vs. Carter*, 3 *Kay & Johns. V. C. R.* 230, 241,) decided by Vice-Chancellor Sir W. Paige Wood, A. D. 1857. A director is a trustee for the stockholders and the creditors, and he is not permitted by law to make contracts for his own advantage, in reference to the trust property, or his duties in reference thereto, and all such transactions are held illegal. (*Ib.* and *Fuller vs. Dame*, 18 *Pick. Mass. R.* 472.)

In the last case an action was brought on a note given

by a man, who was a director in a rail-road and land company, and who, to induce a location of a dépôt on land given by the land company, gave the note on a secret agreement, was held illegal, as the agreement was against public policy and void, as a director cannot legally stipulate for his private advantage, as thereby a conflict of interest would arise and the public interests might suffer. •

In *Foster and others vs. Essex Bank*, and *Vose vs. Grant*, (15 *Mass. R.* 505, and 16 *Ib.* 245,) the Supreme Court of Massachusetts held, that if the directors of a corporation divide up the corporate funds, leaving debts unpaid, it would be a violation of duty that would make the directors personally liable to the parties injured by such wrongful act.

Upon principle, directors are personally liable to any party injured by any wrongful act or omission of duty.

## TREASON.

SEC. 40. The security of the national government against overthrow by violence, and the enforcement of the laws of the Union are provided for in our republic by giving to the national government the purse and the sword for that and other national objects. It is the duty of the national government to preserve the State governments as well as itself from destruction by forcible revolution. (*Const. U. S.* art. 3, § 3. *Ib.* art. 4, § 4.) The third article of the Constitution declares that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort; that no person shall be convicted unless on the testimony of two witnesses to the same overt act, or on confession in open court, and that Congress shall have power to declare the punishment of treason; but no at-

tainer of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

- Treason, under our Constitution, can only be committed by acts pursuing a criminal intention. In the case of Bollman and Swartwout, the Supreme Court of the Union decided, that to commit this crime war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. Again, the court say: That to complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design; that in the case then before the court, a design to overthrow the government of the United States, in New-Orleans, by force, would have been unquestionably a design which, if carried into execution, would have been treason; that the assemblage of a body of men for the purpose of carrying it into execution would amount to levying war against the United States; but that no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war. The court cite, with approbation, Judge Chace's opinion on the trial of Fries, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither lessens nor increases the crime; whether by one hundred or one thousand persons, is wholly immaterial. The same principle was laid down on Burr's trial, (1 *Burr's Trial*, 44; 2 *Ib.* 427, 430, 442, 444,) by Chief Justice Marshall. (*U. S. St. Trials*, 534, 535.)

It has been held, in *The United States vs. Vigol*, and *United States vs. Mitchell*, (2 *Dall.* 346, 348,) that an insurrection to compel United States officers to resign, and thus defeat the performance of their duties, under an act of Congress, was treasonable.

The court, in the case of *Bollman and Swartwout*, (4 *Cranch*, 125,) say: It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in a general conspiracy, are to be considered as traitors.

Judge Iredell, when John Fries was indicted, stated to the grand jury that if, in the case of the insurgents who might come under their consideration, the intention was to prevent by force of arms the execution of any act of Congress of the United States altogether, any forcible opposition calculated to carry that intention into effect, was levying of war against the United States, and of course an act of treason. (*U. S. St. Trials*, 480, 537, 634, 635.) This opinion was quoted with approbation by Chief Justice Marshall, in giving his opinion in Burr's case. (2 *Burr's Trial*, 437.)

A conspiracy to subvert by force the government of the Union; violently to dismember the Union; to compel, forcibly, a change in the administration; or to coerce the repeal or adoption of an act of Congress by compulsion, is a conspiracy to levy war against the United States; and, if carried into effect by the actual employment of force, by the embodying and assembling of men, whether with or without arms, for the purpose of executing the treasonable design previously conceived, amounts to a

levying of war, and is treason. (2 *Burr's Trial*, 439, 441—444. Fries' case, *U. S. St. Trials*, 480, 537, 634, 635.)

In Burr's case, Chief Justice Marshall, in explaining the opinion of the Supreme Court before given, said: That the court unquestionably did not consider arms as an indispensable requisite to levying war; an assemblage, adapted to the object, might be in a condition to effect or to attempt it without them. (2 *Burr's Trial*, 444.)

A military assemblage in arms, for the purpose merely of foreign conquest, if its object was to make war upon a nation at peace with the United States, would be a high misdemeanor, but not treason against the United States. (4 *Cranch*, 125.)

Our acts of Congress declare, that all persons owing the United States allegiance who shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death. (1 *U. S. St. L.* 112.)

Foreigners, within our territory, owe a temporary allegiance to the Union, and may there commit treason. (*Wheat. Hist. L. N.* 171.)

Any such persons, owing allegiance to the United States, and having knowledge of any such treason, who shall conceal it, or fail to disclose it to the President or a judge of the Union, or to the governor of a State or State judge, are, by the act of Congress, declared guilty of misprision of treason, and are to be imprisoned not exceeding seven years, and fined not more than one thousand dollars. (1 *U. S. St. L.* 112.)

A party charged with treason is, by the act, entitled to a copy of the indictment, a list of the jury and witnesses, and their names, with their places of abode, at least three entire days before the day of trial. He is also entitled to defence by counsel, and the court is required to assign counsel to defend the accused, and to grant process for his witnesses. (*Ib.* 118.)

A conviction works no corruption of blood or forfeiture of estate. (*Ib.* 117.)

The offences of treason and misprision of treason are barred, unless an indictment is found within three years after the offence is committed. (*Ib.* 119.)

Such are the humane and wise laws of the Union to protect our citizens from constructive treasons, which in monarchies have been freely used to destroy political opponents and sweep their estates into the king's coffers, under legislative bills of attainder, or royal or judicial decrees. Benign as our law is, it is a tower of strength for preserving the omnipotence of law and the fidelity of our citizens. It is obvious that treason or misprision of treason can be committed within or without the Union by our own citizens, but that no foreigner can commit the crime, unless he owes a temporary allegiance to our laws and is actually within the United States. It is obvious, from the above exposition of the law of treason, and from the acknowledged principle that acts of Congress are the supreme law of the land, that any attempt to defeat in any State or district of the United States the execution of a constitutional act of Congress by means of a rebellion, would bring the conspiring insurgent parties within the act of Congress against treason. State legislatures and individuals may lawfully pass resolutions and present petitions to influence the national legislature by argument; but cannot resist the execution of a constitutional law of Congress by force with impunity. And the

Supreme Court is the ultimate tribunal whose decision upon the constitutionality of an act of Congress is conclusive.

That tribunal is the constitutional umpire of the States of our Union, and its decision is final in all controversies between the States, and between the Union and any State, or between the Union and an individual or body corporate. (11 *Pet.* 209. 16 *Ib.* 314. 7 *How.* 679. 5 *Ib.* 343. 3 *Ib.* 318. 5 *Cranch*, 115. 5 *Wheat.* 264, 598.)

No State can make war upon another State.

The provision of our Constitution making the Supreme Court the umpire is obviously necessary to the steady and peaceful enforcement of our treaties, Constitution and acts of Congress. All human experience has shown that there will be a diversity of opinion on questions of law and public policy. Hence the convention, in framing a Constitution for our republic, referred for final arbitrament and enforcement to the Supreme Court of the Union, all questions between two or more States, or between the Union and any State, and the decision of that court in favor of any right secured by any of our treaties, by the Constitution or by act of Congress in pursuance of it, the President is bound to enforce by the whole military, militia and naval power of the Union. (*Const. U. S.* art. 6, § 2; art. 1, §§ 1, 2, 8; art. 3, § 2. 1 *U. S. St. L.* 424, § 2; p. 85, § 25. 2 *Ib.* 443.)

It has been alleged that the resolutions of Virginia and Kentucky, 1798 and 1799, against acts of Congress, commonly called the alien and sedition laws, affirm a different doctrine. (1 *Calhoun's W.* 358.) These famous resolutions were prepared by Jefferson and Madison. Mr. Madison, in a letter to Mr. Rives, our Minister to France, explained that the declaration in those resolutions, that if the acts of Congress complained of were not repealed, it was the



right and duty of the States to interpose and seek a rightful remedy, did not mean that any *separate State should resort to any means of resistance*, but the action of the States *combined* was contemplated. And he refers to the provision for calling a convention of all the States, on the application of two-thirds of the number, as the remedy intended. (Ch. 1, vol. 3, *Am. Quart. Reg.* 267, 268.) His letter to Mr. Webster is to the same effect. As Mr. Madison must have known the true meaning of his resolutions, the doctrine of nullification of an act of Congress by a single State or by rebellion is clearly not supported by them. It would, indeed, be absurd for one of our numerous States to be allowed to put down and nullify by force a constitutional act of Congress within its borders, while all the residue of the States were obeying it. It is yet more absurd to allow a majority of a State legislature to sit as a national court and decide upon the treaties, Constitution and laws of the Union in the place of the Supreme Court, specially agreed on by all of the States for that purpose, and to exempt the people of such rebellious State from all national obligations that the State legislature may disapprove. If one State may do this, all may. Our system is not justly chargeable with any such self-destroying principle. (See ch. 1, and *Madison's Letters*.)

Hence no pretended law of a State can nullify an act of Congress, or protect any person from the civil or criminal laws of the Union, or justify any use of force in resistance of the execution of a constitutional act of Congress, or an act which the court of *dernier resort* may ultimately decide to be constitutional.

Giving aid and comfort to the enemies of the United States is treason against the United States, but is not treason against a State. And a State court cannot take cognizance of it. (*Rawle on the Const.* 306. 11 *Johns.*



*R.* 553, 554. *Story's Com. on the Const.* vol. 2, p. 543, note.\*)

Treason against a State is an attempt to overthrow a government, or to defeat a State law by rebellion and the employment of force. It is an offence against the State municipal authority. In such cases of powerful resistance by force to State law, a State legislature may declare martial law, and employ the State militia to suppress the rebellion, and aid the civil authorities to enforce the laws of the State. A State may also pass laws and punish treason against the State. (2 *R. S. N. Y.* 546, § 2. *Rhode Island Act of January, 1838, to punish offences against the sovereignty of the State*, and *Rev. Laws of Virginia of 1819*, ch. 162, p. 560, and other like State laws. *Const. Wisconsin of 1848*, art. 1, § 10. *Luther vs. Borden*, 7 *How.* 39—43.)

The Constitution of California thus defines treason against that State: "Treason against the State shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court."

In the case of *Luther vs. Borden et al.* (7 *How. R.* 39, 40, 42, 43,) it was held by the Supreme Court of the United States, that it belonged to the old charter State government of Rhode Island to decide upon the mode of establishing a new constitution, and when it was to be superseded by a new State government; that the question was not a judicial one, but was political, and that its decision belonged to the established State legislative power; that the duty of the national government, under the fourth section of the fourth article of the Constitution of the Union, to guarantee to each State a republican form of government, and on application of the executive or legis-

lature, to protect each State from domestic violence, it rests with Congress to decide what government is the established one in a State; and that, pursuant to this authority, Congress, by the act of February 28th, 1795, provided that, in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive, (when the legislature cannot be convened,) to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection. That by this act, the power to judge of the exigency calling for national interference rests solely with the President. That the legislature of Rhode Island had legal authority to declare martial law to put down an insurrection; and that officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing a traitor might be there concealed.

This case settles the doctrine that an existing State government cannot be displaced by a new one, except by a convention elected pursuant to a law, and by a new constitution formed and adopted pursuant to a law of the old State government; that a State legislature cannot establish permanent martial law, but may authorize the exercise of temporary martial law to put down insurrection; and that the State government must judge of the degree of force necessary to put down the rebellion.

This decision is a simple and judicious application of the great republican doctrine, that all changes in our State or national constitutions must be effected, if at all, peaceably by votes and not by the sword.

The same doctrine is applicable to the existing Constitution of the United States. All the States have agreed to form one national government, and that the Supreme Court of the Union should ultimately decide all questions that may arise between State and State and between the United States and a State. No State, therefore, can recede from the Union at will, or attempt to change the Union of the States by force with impunity.

DISTINCTION BETWEEN TREASON AND OBSTRUCTIONS TO THE  
EXECUTION OF LAW.

SEC. 41. Conspiring to commit treason, with no forcible act done in pursuance of the conspiracy, is not a levying of war, and is not treason. So, conspiring to defeat the execution of a national law in one or more particular instances, without an intention to defeat the general effect of such law, though followed by forcible resistance to it by numbers in the specified cases, is not a levying of war, and is not treason against the United States. (*U. S. St. Trials*, 480, 537, 634, 635. Justice Grier's decision in the case of the Christiana rioters, charged with treason, and tried before the Circuit Court for Pennsylvania.)

Our constitutional definition of treason was intended to make a new and original American definition of treason that should exclude all constructive treasons and all British precedents of law, the cruel instruments of many judicial murders. Hence, every resistance to a national law that is not, in the American sense of the term, a levying of war against the United States, is not treason within the Constitution of the Union.

But all forcible resistance to national law, by one or more persons, if not treasonable, falls within acts of Congress enacted for their punishment, of obstructions by force or intimidation, as crimes against the United States.

(*U. S. St. L.* 118, §§ 1, 2; p. 113, § 5; p. 117, §§ 22, 23; p. 316, § 31; p. 678, § 71; p. 488, § 2. 4 *Cranch*, 125, 128. 2 *Burr's Trial*, 427, 429, 430.)

Judge Sprague, in the District Court of the United States for Massachusetts, in 1851, thus presented to the grand jury, in his charge, the distinction between treason and illegal obstructions to the execution of a law.

#### JUDICIAL RECOGNITION OF NATIONS AND STATES.

SEC. 42. Our national and State courts follow the decisions of our government, and recognise as States and nations, or the political character allowed by it to foreign nations and to the States of our Union. (7 *How.* 39, c. 1, § 15. 4 *Wheat.* 52. 12 *Pet.* 520. 6 *Wheat.* 193.)

#### NATIONAL JUDICIARY AND STATE DECISIONS, &c.

The national courts follow State decisions and judicial expositions of local or State law in cases depending on it, unless they are in conflict with the national Constitution, an act of Congress or a treaty of our republic. These State authorities are resorted to as evidence of State law. (10 *Wheat.* 152. 2 *Ib.* 316. 12 *Ib.* 153. 7 *How.* 40. 12 *Pet.* 32. 16 *Ib.* 1, 18. *Ante*, §§ 25, 35.)

But State decisions do not bind the national courts on questions not depending on a State constitution, law or usage, as, for example, questions arising upon the general law-merchant, the construction of ordinary contracts or written instruments, rights of free navigation of the navigable rivers of a State, and other like questions. (*Ib.*)

LINE OF DEMARCATION BETWEEN THE NATIONAL AND STATE  
JUDICIARY.

SEC. 43. In addition to what we have said we propose to give an idea of the dividing line between the national and State judicial power.

## ADMIRALTY, FEDERAL AND STATE JURISDICTION, &amp;C.

The admiralty and maritime jurisdiction of the federal courts is secured to them by the Constitution and the laws of Congress. The 9th section of the Judiciary Act of 1789, (1 *U. S. St. L.* pp. 76, 77,) declares that the District Courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, or fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it; and shall also have original exclusive cognizance of all seizures on land, or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several States, or

the Circuit Courts, as the case may be, of all causes where an alien sues for a tort only, in violation of the law of nations or a treaty of the United States; and shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the District Courts, in all causes, except civil causes, of admiralty and maritime jurisdiction, shall be by jury. (See *Ib.* and notes.)

SEC. 44. When the District Courts and State Courts have concurrent jurisdiction, it has been decided that the right to maintain jurisdiction attaches to the tribunal that first exercises it and obtains possession of the thing. (Robert Fulton, *Paine's C. C. R.* 620. 1 *U. S. St. L.* 77, n. b.)

SEC. 45. It is also decided, that the federal courts have exclusive jurisdiction of all seizures made on land or water for breach of the laws of the United States; and that any intervention of State authority to take the thing seized from an officer of the United States, and thus obstruct the exercise of the national jurisdiction, is unlawful. (*Slocum vs. Mayberry*, 2 *Wheat.* 1.) If property is illegally seized by an officer of the United States, and it be so adjudged in the federal court, the party injured has his election to sue for the wrongful taking in a State court, or in the District Court acting as an admiralty and revenue court, if the case be one of admiralty or revenue jurisdiction. The common law courts of the United States have no jurisdiction in such cases. (*Ib.* 10, 12.)

## CIRCUIT COURTS.

The eleventh section of the Judiciary Act (1 *U. S. St. L.* 78) declares, that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided.

SEC. 46. It has been decided, that the circuit and district courts cannot send their process out of their respec-

tive districts, except where specially authorized by acts of Congress. (3 *Wash. C. C. R.* 456. 1 *U. S. St. L.* 515. 9 *Pet.* 290.)

That the circuit courts have no original jurisdiction of suits for penalties and forfeitures. (2 *Dall.* 365.)

That it must appear, when the jurisdiction of the circuit court depends on the character of the parties, that each of the plaintiffs and defendants must be competent to sue and be sued in the national courts, or the jurisdiction fails. (14 *Pet.* 60.)

That a corporation aggregate is not a citizen of the United States; but that the national courts will look beyond the corporate character to the individuals composing the corporation, and if they are citizens of a different State from the party sued, they will entertain jurisdiction. (14 *Pet.* 60.)

SEC. 47. That where the jurisdiction of a national court has once attached to a cause, death or change of domicile of the parties will not divest it; and that in the former case, where the cause of action survives, a bill of revivor may be prosecuted, and in the other case the cause may proceed. (12 *Pet.* 164, 171. 1 *U. S. St. L.* n. b. p. 78.)

#### ADMIRALTY, &c.

SEC. 48. Judge Story lays down the rule, that the admiralty and maritime jurisdiction of the national judiciary is exclusive in those cases where, at the adoption of the Constitution, that jurisdiction excluded the common law courts; and that where the latter courts then exercised concurrent jurisdiction, they still retain it. (3 *Story's Com. Const. U. S.* p. 533, note.)



## MARITIME CONTRACTS.

In the cases of the *Alberfoyle* and the *Pacific*, (1 *Blatchf. N. Y. C. C. R.* 360, 583,) the Circuit Court of the United States, by Mr. Justice Nelson, decided: "That ships, engaged in carrying passengers on the high seas for hire, stand on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandise, the passage-money being the equivalent for the freight; that, therefore, on a breach of passage contract, and damage resulting, the ship, as well as the owner, is bound to respond," and that in both cases the admiralty have jurisdiction. The court held the ship chargeable by a proceeding *in rem* for a violation of such maritime contracts.

In the case of the *Grafton*, (*Ib.* 178,) the same court held, that the consignees of a ship had a right to agree with the consignees of the cargo as to the time and manner of discharging her cargo.

In the District Court of the United States at New-York, in the case of *Vose vs. Allen*, decided January, 1854, where iron was freighted from a foreign country to New-York, and it was improperly landed in too large quantities on a wharf that broke down, and some of the iron was lost, the court held that the admiralty had jurisdiction of the case, and that the libellants should recover for the full loss. (See *Act of Cong.* of March 3d, 1851. 9 *U. S. St. L.* 635.)

Maritime contracts are within admiralty jurisdiction, and when funds, the proceeds or subjects of such contracts, are in the custody of admiralty courts, they may entertain supplemental suits to ascertain to whom they belong. (3 *How. R.* 568.) In *Andrews vs. Wall*, (*Ib.* 572,) the Supreme Court of the United States say: "We are of opinion that it is a case within the jurisdiction of

the court. It is a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. Over maritime contracts the admiralty possesses a clear and established jurisdiction, capable of being enforced *in personam* as well as *in rem*; as is familiarly seen in cases of mariner's wages, bottomry bonds, pilotage services, supplies by material men to foreign ships, and other cases of a kindred nature." (See, also, 4 *Wheat.* 438. 7 *Pet.* 324.)

In *New-Jersey Steam Navigation Co. vs. Merchants' Bank*, (6 *How.* 390, 431, 436,) the Supreme Court of the United States held, in the case of a steamer navigating from New-York through the Sound, to and from a port of a neighboring State, and a loss occurring from a fire by negligence of the master, that the owners of the steamer were liable to be sued in the federal courts, as the subject was of maritime and admiralty jurisdiction. The court say, (p. 390,) that the entire admiralty power of the country is lodged in the federal judiciary, and that it is an exclusive one, and that the State courts have no concurrent admiralty jurisdiction in such cases.

That the judiciary act of Congress of 1789, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, leaves the concurrent power where it stood at common law. That the clause has no application to *seizures* under the revenue laws or laws of navigation, as these belong exclusively to the district courts.

That where a seizure is made and the thing is acquitted, a suit for the illegal taking or detention may be brought either in admiralty or at common law.

The court also held, (p. 390,) though it was otherwise in England, that in this country courts of admiralty have jurisdiction in suits by ship-carpenters and material-men, for repairs and necessaries made and furnished to ships,

whether foreign or in the port of a State to which they do not belong; or in the home port, if the municipal laws of the State give a lien for the work and materials.

Mr. Justice Nelson, in giving the test of the jurisdiction of the federal courts in that case, says, that in the cases before the federal courts in discussing the question of admiralty jurisdiction, the inquiry has not been what was the jurisdiction of the admiralty of England, but into the nature and subject-matter of the contract; whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of tide. And again, whether the service was to be substantially performed upon the sea or tide-waters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained. But if the substantial part of the service, under the contract, relates exclusively to the interior navigation and trade of a State, jurisdiction is disclaimed. (10 *Wheat.* 428. 7 *Pet.* 324. 11 *Ib.* 175. 12 *Ib.* 72. 5 *How.* 463.)

That the exclusive jurisdiction in admiralty cases was conferred on the national government as closely connected with the grant of the commercial power.

That it is a maritime court, instituted for the purpose of administering the law of the seas. That there seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it in cases of contracts to those concerning the navigation and trade of the country upon the high seas and tide-waters, with foreign countries and among the several States.

That trade and commerce growing out of the purely internal commerce of the State, as well as commerce beyond tide-waters, are generally domestic in their origin and operation, and could scarcely have been intended to

be drawn within the cognizance of the federal courts. (See 12 *How.* 443. 13 *Ib.* 101, 283 ; and ch. 5, § 3.)

In *Allen vs. Newberry*, (21 *How.* 245—247,) and *The New-Jersey Steam Navigation Co. vs. Merchants' Bank*, (6 *Ib.* 392,) the Supreme Court of the United States held, that the admiralty jurisdiction was maritime for administering the navigation and trade of the country on the high seas, &c., with foreign countries and among the several States, and that it did not include the purely internal commerce from one port of a State to another port of the same State, though the goods might be carried in a vessel, by sea or on the great lakes, sailing or steaming under a United States license.

In the case of the *Genesee Chief vs. Fitzhugh*, (12 *How.* 454, 455, 457,) the Supreme Court of the United States decided that its admiralty power extended to our great lakes. The court held that a definition that would limit public rivers in this country to tide-waters was inadmissible, as our country has many thousand miles of navigable rivers and great inland lakes or seas, where the tide does not ebb and flow. That the admiralty jurisdiction extends to such rivers, great lakes, and the waters connecting them as public waters.

This case reviews all prior decisions of that court, and repudiates their limitation of its admiralty power to tide-waters. The admiralty, according to this case, extends to all nationally navigable rivers, great lakes, as well as to bays and tide-waters. The reasons of the court, given by Chief Justice Taney, are conclusive, and finally settle this point. (See Santvoord's *Lives of Chief Justices of the United States*, § 525. 16 *How.* 469. 21 *Ib.* 13. *Ib.* 244.)

The maritime and admiralty jurisdiction extends to vessels sailing on the great lakes as well as on tide-waters, and in case of collision the vessel in fault must pay the

damages, and if both parties are equally in fault, or the collision arises from inevitable accident, each must bear its own loss. (13 *How.* 101, 283. 5 *Ib.* 441. 12 *Ib.* 443. 14 *Ib.* 532.)

In *Jackson and others vs. Steamboat Magnolia*, (20 *How. U. S. R.* 296,) it was held that the admiralty jurisdiction of the United States extends to collisions between vessels licensed by the United States, arising on fresh waters that are navigable above tide-water as well as below. The admiralty power seems to extend to collisions between a vessel with a national license and any other. But it does not reach the enforcement of a mortgage, not being an hypothecation, or seamen's wages, claims for work and materials, or a claim of the master and part-owner for advances, and for sale of the vessel or steamer and division of the proceeds among the owners, where the employment of the same is not substantially maritime, though she may navigate from a tidal port, like New-York or New-Orleans, to other inland ports. (10 *Wheat.* 428. 11 *Pet.* 175. 5 *U. S. St. L.* 726. 9 *Ib.* 635. 21 *How.* 13. 25 *Ib.* 244. 17 *Ib.* 399.)

Nor does it extend to work and labor or materials applied to a ferry-boat, though running wholly on tide-water. (20 *How.* 393.)

#### JUDICIAL RULES AS TO COLLISIONS.

The Supreme Court of the United States have settled (17 *How. U. S. R.* 178, 182. 21 *Ib.* 1, 6, 184, 372. 18 *Ib.* 463,) the following principles:

1. That when a sailing-vessel and steamer are approaching each other the general rule is, that the sailing-vessel should keep on her course, and that the steamer should keep out of the way. But this rule presupposes that the steamer discovered, or ought to have discovered,

the sailing-vessel when at a sufficient distance to avoid her by changing her course.

2. That where at night, or from a haze or fog, they are unexpectedly brought into proximity, and the ordinary rule will not prevent collision, it is the duty of each to do that which is most likely to prevent collision.

3. That if a steam-tug tows a vessel into port, and she comes into collision with a vessel at anchor without any wrong of the towed vessel, but by the fault of the tug and vessel at anchor, they must equally contribute to pay the damages to the vessel in tow.

4. That municipal regulations of seaports, or of laws of the States, requiring the exhibition of lights at night, and the positions vessels shall occupy in ports and in rivers, are legal regulations; and vessels not observing them, must pay the damage of collisions arising from such neglect of duty.

5. That steamers in fogs and at night must slow their motion to a safe speed, and if a collision happen from neglect of this duty, the steamer must pay the damages.

6. That steamers meeting on the Mississippi River, the one ascending and one descending, the former is bound to keep near the right bank, and the descending one must keep near the middle of the river, and if either produce a collision by neglecting this duty, she must pay the damages.

7. That it is the duty of vessels to have a proper watch to prevent collisions.

#### WATER COMMON CARRIERS.

Common carriers by water, like those by land, in the absence of statutory enactments, are in general insurers, and liable at all events, and for every loss or damage, however occasioned, unless it happen by the act of God

or the public enemy, or by some other cause and accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. (21 *How.* 14. *Ib.* 244. 5 *U. S. St. L.* 726.) The law imposes on him the following duties: (21 *How. U. S. R.* 23—25.)

1. He must provide a sea-worthy vessel, tight and staunch, and well furnished with suitable tackle, sails or motive-power, as the case may be, and furniture necessary for the voyage.

2. She must have a crew adequate in number, and sufficient and competent for the voyage, and a competent and skilful master, of sound judgment and discretion.

3. That in steamships and vessels of the larger size, a person suitable for a substitute for the master, in case of his sickness or disqualification.

4. That the cargo must be properly stowed and arranged, so that different goods may not be injured by each other, or by the motion of the vessel or its leakage. Unless, by agreement, this duty is to be performed by some person employed by the shipper.

5. If there is no special agreement, the master's duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable, as well as the master and the owners.

6. That a clean bill of lading, in general, imports, unless the contrary appear on its face, that the goods are to be safely and properly secured under deck.

7. That the master, as agent of the owners, must carry the goods in his own ship to the place of destination, unless he is prevented from so doing by some irresistible force, beyond his control, and that human skill and prudence could not resist.

8. That if his vessel is wrecked or disabled, and cannot



be repaired without too much expense or too great delay, the master may tranship the goods, and forward them in another vessel, and earn his whole freight; and that, if another vessel could be got in a neighboring port, or within a reasonable distance, it is the master's duty to procure it and forward the goods to their destination; and in such event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured. This rule is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time.

9. That when he cannot tranship, it is his duty to repair his ship, when capable of it, if it can be done in a reasonable time, and he can command the means to do it; and if not, and the means cannot be obtained from the owner, or upon the security of the ship, he may sell a part, or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be able to resume his voyage and carry the goods or the residue, as the case may be, to the place of destination; and that he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel in a reasonable time, and carries them to the place of delivery.

These are ancient rules of law, and fix the duties of the common carrier, unless changed and so far altered by legislative enactment.

10. That the master is bound to the safe custody of the goods; and if a vessel is stranded, a master is bound to protect the goods from every peril, as far as possible. (21 *How. U. S. R.* 8, 24—28.)

11. That carriers may be answerable for loss or damage in cases where there is, in fact, no fault imputed to them; and in such cases, where the damage is established, the burden lies upon the respondents to prove that the loss arose from one of the perils from which they are ex-



empted by the contract of shipment or bill of lading. (21 *Ib.* 29. 12 *Ib.* 272, 347.)

These doctrines apply to our great lakes as well as to navigation by sea. It is settled that the act of Congress, (9 *U. S. St. L.* 635,) limiting the liabilities of ship-owners, does not apply to inland navigation upon our great lakes, but to marine affreightments only. (21 *How.* 7, 14. *Ib.* 244.)

The law relative to salvage does not apply to rafts or other like craft in navigable rivers, though the tide ebbs and flows in the place where the salving service is rendered. Chief Justice Taney, holding the Maryland United States Circuit Court, so decided in the Port Deposit Raft case, and held that no admiralty jurisdiction in the national courts existed in such cases. Nor is salvage allowed to officers and sailors on board an American man-of-war for taking an American ship on the high seas, that had been abandoned, and bringing her safely into port, pursuant to general order of our government. (2 *Blatchf.* 322.)

In *Waring vs. Clarke*, (5 *How.* 441,) the Supreme Court also decided, that our Constitution does not refer to the admiralty and maritime jurisdiction as established in England, but to that of this country, which was more extensive.

That court has likewise decided, that the admiralty and maritime jurisdiction extends to vessels substantially engaged on tide-waters in maritime navigation. (11 *Pet.* 182, 183. 5 *How.* 163, 463. 6 *Ib.* 389. 12 *Pet.* 76. 1 *Conklin's U. S. Ad.* 15, 18, 22. For Judge Conklin's views of our admiralty laws, see his *U. S. Admiralty.*)

In *United States vs. Coombs*, (12 *Pet.* 76,) the court, speaking of admiralty and maritime jurisdiction, say: That in cases purely dependent on the locality of the act done, it is limited to the sea, and to tide-waters as far as the tide

flows, and that it does not reach beyond high-water mark. Again, the court say: That mixed cases may arise, and indeed often do arise, where the acts and services are of a mixed nature, as where salvage services done are of a mixed nature, partly on tide-water and partly on shore, for the preservation of the property saved; in which cases the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage.

SEC. 49. In the same case, (p. 78,) the court say: That the power of Congress to regulate commerce with foreign nations and with the several States, gives power to punish acts done on water in the course of navigation, or on land which interfere with, obstruct or prevent the due exercise of the power to regulate commerce with foreign nations and among the States. This admiralty and maritime jurisdiction extends to the great lakes. (5 *U. S. St. L.* 726.)

SEC. 50. As the national government has exclusive jurisdiction of our foreign relations and questions of war, no State can exercise any jurisdiction as to belligerent acts within its limits; nor can its courts try or punish any individual of a foreign public armed force, or any person on board of an armed ship of a foreign nation, for a hostile act or capture. These questions belong exclusively to the national government. (5 *U. S. St. L.* 539. *Letters of Mr. Fox and Mr. Webster*, copied in note. 25 *Wend.* 507, 512. 16 *Johns.* 327.)

Aliens resident in the United States may sue in the national courts. (7 *Pet.* 428.) And the Supreme Court of the United States add, in that case, that if parties were originally aliens, they did not cease to be so, or lose their right to sue in the federal courts, by a residence in a State of our Union. (*Ib.* 431.)

SEC. 51. Cases of piracy belong exclusively to the federal courts. (16 *Johns.* 331. 2 *How.* 210. 1 *U. S. St. L.*

113, § 8. 3 *Ib.* 510, 600, 721. 2 *Ib.* 70, 71. 1 *Sess. L.* 1847, p. 95. 12 *Wheat.* 1. 11 *Ib.* 1.)

SEC. 52. The national courts have exclusive jurisdiction of seizures by virtue of acts of Congress, for violations of revenue laws. (§ 9 of *Judiciary Act. Ante*, § 61. 3 *Wheat.* 246. 2 *Ib.* 1, 9, 362. 16 *Pet.* 342.)

SEC. 53. That jurisdiction extends also to salvage cases. (1 *U. S. St. L.* 716, §§ 13, 14. 3 *Wheat.* 78. 15 *Pet.* 41.)

State courts have no jurisdiction of salvage cases. (5 *Barb. S. C. R.* 209.)

#### PATENTS.

SEC. 54. All questions of the validity of patents belong to the national courts exclusively. (5 *U. S. St. L.* 119, 191, 353. 3 *Ib.* 481. 7 *Johns.* 144. 2 *Paige's Ch. R.* 138. 3 *Comst. N. Y. Ap. R.* 9, 12.)

Where exclusive jurisdiction belongs to the national courts, consent cannot confer it on a State court. (3 *Comst. R.* 12, 14.)

SEC. 55. In cases pending before a national court, as in bankruptcy, where such court is vested by act of Congress with jurisdiction, and a State court is proceeding with a suit against the bankrupt or in relation to his property, the national court may issue an injunction, or other proper order to the prosecuting party in the State court, and stay the proceedings there. (*Ex parte Christie*, 3 *How.* 292. 9 *Wheat.* 738.)

The national courts recognise all liens arising under State laws, unless they are invalidated by a treaty, the Constitution or acts of Congress. (7 *How.* 612, 622, 623.)

SEC. 56. If a State officer, under a State law, interferes with the property of the United States, or of a bank chartered by it, a national court may issue an injunction against the officer, in a suit against him. (9 *Wheat.* 738.)

SEC. 57. A national court cannot issue an injunction or prohibition to State courts, but it may, in proper cases, to parties to such suits, and thus control them. (1 *Kent's Com.* 5th ed. 411, 412. 4 *Cranch*, 179.)

The Supreme Court of the United States, in *Duncan vs. Darst et al.*, (1 *How. U. S. R.* 308,) say: It never has been supposed that the judges of the national courts could control the process of the State courts, or that the latter could control those of the national courts. In this case, one Roth was arrested by a United States marshal, and committed to a jail of Pennsylvania, at the suit of Darst et al., and under an insolvent law of that State, a State judge discharged Roth, and the jailer allowed him to go at large. This was an action for escape against the sheriff. It was held to be an escape, as the Circuit Court of the United States, on whose judgment and execution Roth was committed, alone had power to control the execution of its process.

In *Beers vs. Haughton*, (9 *Pet.* 359,) the same court held, that State laws cannot control the powers of the national government, or in any manner limit or affect the operation of the process or proceedings of the national courts; and that the efficacy of State laws in the courts of the United States depends on the enactments of Congress.

## APPEALS.

The Supreme Court of the United States has an appellate jurisdiction from the decisions of the highest State courts that have been admitted into the Union, if the decision is against a right claimed under the Constitution of the United States, an act of Congress, or a treaty of the United States, or an authority claimed under the United

States. The same remedy applies to cases where the validity of a State law or authority is drawn in question as being repugnant to the Constitution, to treaties or laws of the United States; and when the decision of the highest State tribunal is in favor of its validity, or where is drawn in question the construction of any clause of the Constitution of the United States, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute or commission. In the Supreme Court of the United States such decrees of the State tribunals of *dernier resort* may be, on appeal, reversed or affirmed, as shall be just. (1 *U. S. St. L.* 85, 86, p. 81. *Ib.* 261, n. d. 6 *Pet.* 561. 4 *How.* 20. 5 *Ib.* 343. 6 *Wheat.* 264, 375, 378, 413. Ch. 4, § 40.)

If a clerk of the highest State court neglects or refuses to certify a record of judgment to the Supreme Court of the United States, on writ of error, an order may be obtained for the clerk to show cause why he so omits his duty, and may, for want of such return to the writ of error, proceed and review the case on the pleadings and decision authenticated, to the satisfaction of the court. *United States vs. Booth*, (18 *How.* 476. *Ib.*)

## MANDAMUS.

Acts of Congress regulate writs of *mandamus* in the national courts. On appeal, the Supreme Court of the United States can pass on this subject. (1 *Cranch*, 137. 12 *Pet.* 524.)

In *Reeside vs. Walker*, Secretary of the Treasury of the United States, (11 *How.* 272, 289,) it is decided that a *mandamus* would not lie against the defendant, unless "the laws required him to do what he is asked in the

petition to be made to do." In this case, the application to compel Walker to credit Reeside with the amount declared by a jury due him from the United States, and then to pay it, was denied, as there was no law making it his duty to do it. (p. 289.)

The court say: A *mandamus* can only be resorted to to compel the performance of some ministerial as well as legal duty, where the officer improperly refuses to do it. (p. 290.)

In the case of Kendall, Postmaster-General, *vs.* United States, in relation of Stokes, (12 *Pet.* 524, 609, 610,) it was decided, that a law directing a ministerial duty and act of the Postmaster-General created a legal obligation that the Circuit Court of the United States could enforce by *mandamus*; that the executive was independent of the judiciary. The court disclaimed any power to control the discretionary official action of the executive.

The court held (p. 611) that the United States could not be sued without consent; but that, by act of Congress, the claims of Stokes had been submitted for decision to the Solicitor for the Treasury, with directions to the Postmaster-General to credit him for the amount found in his favor for a mail service, and that the award having been made in favor of Stokes, the Postmaster-General was bound by law to credit it; and that refusing to credit a part of the sum awarded, the Circuit Court had authority to compel him to do so by *mandamus*.

The Court also held, (612, 613,) that the President had no power to prevent such credit or to control the matter, and that the Postmaster-General had no discretion, and was bound to credit the whole award, as the act made the award final.

In considering the question of jurisdiction, the court say, (623,) that no court can, in the ordinary administration of justice, in common law proceedings, exercise juris-

diction over a party unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. That such process cannot reach the party beyond the territorial jurisdiction of the court; that this privilege may be waived by appearance, and that if a party appears and objects to the jurisdiction, it must be by plea or in an early stage of the case. That the court had jurisdiction of the person of Kendall, and its jurisdiction, by act of Congress, extended to all cases in law and equity of judicial cognizance. That a *mandamus* is a judicial proceeding and appropriate to the case.

The same doctrines are held in the Supreme Courts of New-York and Ohio.

The executive power, in its discretionary official exercise, on subjects within its constitutional jurisdiction, is not subject to judicial review or cognizance, but the proper tribunals, State and national, may, by judicial action, protect legal rights of person and property against wrongful invasion by national or State executives, or their officers or agents. (11 *How.* 272. 7 *Ib.* 39, 41. 4 *Wheat.* 40, 420, 423. *Ante*, § 19.)

SEC. 58. In cases where the exclusive jurisdiction is in the United States courts to try the principal question, as the question of forfeiture for violating a law of the United States, and a suit is pending in a national court to enforce such forfeiture, no action of trespass or other action will lie in a State court while the suit for forfeiture is undetermined. (Gelston *vs.* Hoyt, 3 *Wheat.* 313—315.) The Supreme Court of the United States say, that if the action be commenced while the proceedings *in rem* for the supposed forfeiture are pending in the proper court of the United States, it is commenced too soon; for until a final decree, it cannot be ascertained whether it be a trespass or not, since that decree can alone decide whether the taking be rightful or tortious. The pendency of the suit

*in rem* would be a good plea in abatement, or a temporary bar of the action; for it would establish that no good cause of action then existed.

SEC. 59. A State court cannot try a right of capture where the property is taken *jure belli*. (2 *Doug.* 573. *Knapp. R.* 340. *Vattel*, 6 Am. ed. 391, 392, n.) Such questions belong exclusively to prize courts. But such municipal and State tribunals may try subsequent, incidental and consequential questions. (*Ib.*)

In *Jecker vs. Montgomery*, (13 *How.* 515,) the Supreme Court of the United States decided, that all questions of captures of vessels *jure belli* belonged to the national courts, constituted by acts of Congress pursuant to the Constitution, and that neither the President nor any military officer could establish a court in a conquered country and confer on it prize jurisdiction, binding the rights of the United States and of individuals, and that the acts and decrees of such illegal court were void.

#### TERRITORIAL JURISDICTION OF OUR STATES.

SEC. 60. It extends over the entire territory of the States respectively, and to all persons therein, subject to the State cessions and the grants of power to the national government by the Constitution, and to the restrictions upon the States imposed by that instrument. (11 *Pet.* 138. 12 *Ib.* 733. 10 *How.* 534. 1 *Comst. N. Y. Ap. R.* 173. 2 *Pet.* 251. 3 *Wheat.* 388, 389. 1 *U. S. St. L.* 113, n. a. 5 *How.* 115, 504. *Ch.* 5, §§ 14, 18, 20, 28—36, 65, 71.)

In maritime States this State jurisdiction, subject as aforesaid, covers its maritime curtilage of three marine miles. (3 *Wheat.* 388, 389. 1 *U. S. St. L.* 113, n. a.)

As to States bordering the great lakes, this municipal State jurisdiction extends to the State boundary, but the



right to the soil under water and to the fisheries appurtenant, would seem to be exclusive to the extent of its curtilage, and beyond, it would seem, that a common of fishery would belong to all riparian nations and States of our Union. (*Ch.* 2, § 7. *Ch.* 5, § 3, and *Ch.* 6.)

The States of our Union are municipal sovereignties. In *New-York vs. Miln*, (11 *Pet.* 138,) our national Supreme Court, speaking of the State jurisdiction of the State of New-York, declared that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to provide for the general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all these powers which relate merely to municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered, and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.

The limitations to, and exceptions from State jurisdiction, are found in the Constitution of the Union, in our treaties and acts of Congress passed pursuant to it; in American public law; the private international law of the United States; and in the law of comity belonging to our complex system of national and State sovereignties. (*Ch.* 5, §§ 1, 5—14, 35, 35 a, 37, 39. *Ch.* 4, §§ 6, 40—42. *Ch.* 7, §§ 4, 6, 11—23.) This law of national and inter-state comity, conferring rights and imposing duties on our national and State sovereignties, is a recip-

rocal law of limitation upon them, and forms an essential part of American jurisprudence.

By our treaties and acts of Congress, the seaward limits upon the Gulf of Mexico of Louisiana, include all islands within three leagues of the coast; (2 *U. S. St. L.* 641,) of Alabama, all within six leagues of the shore; (3 *Ib.* 490,) and those of Florida take in all islands adjacent to it, and which were dependent on East or West Florida at the date of the treaty of cession of 1819. (5 *Ib.* 743. 8 *Ib.* 254.)

The State Constitution of California, and many other maritime States, include all islands adjacent to their coasts.

SEC. 61. A State law, repugnant to the Constitution of the State, is illegal and void, and it ought to be so held in all judicial tribunals, and in all cases where a right under it is set up. (19 *Johns. R.* 59. 4 *Hill's R.* 140. 1 *Binney's R.* 421. 5 *Ib.* 355.) This is a necessary result, from the fact that the written Constitution of a State, if not repugnant to the Constitution of the United States, is the supreme State law. And an act of its legislature, made in violation of it, is not truly a part of the State law, and it ought to be so judicially declared by any court or tribunal within or without the State.

This is a delicate power, and, in the exercise of it, courts ought to apply this high power of setting aside State laws to clear cases of violations of the State elementary law.

The power vested in a State legislature of making laws must be exercised by it, and is not transferable. (4 *Seld. N. Y. R.* 483.)

SEC. 62. The power of the highest courts of the United States, and of the States respectively, to decide finally upon the validity of acts of Congress and State laws, according to their respective jurisdictions, grows out of our complex system of government; which divides and

limits the powers of government, and provides practical modes of confining each department within its limits.

SEC. 63. The Supreme Court of the United States has no authority, on a writ of error from a State court, to declare a State law void, merely on account of its collision with a State Constitution; it not being a case embraced in the judiciary act, which alone gives power to that court to issue a writ of error to the highest State court of law or equity to review, and affirm or annul a final judgment or decree, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the right claimed under them. (3 *Pet.* 289.)

#### PRACTICE OF NATIONAL COURTS.

SEC. 64. Congress has exclusive power to regulate the practice of the national courts and their process. (1 *Kent's Com.* 5th ed. 394. 10 *Wheat.* 1, 5. 6 *Pet.* 648. 16 *Ib.* 304, 314, c. 5, §§ 5 a, 25, 35.) In the last cited case, the Supreme Court of the Union say, that when the effect of a State decision is only to regulate the practice of courts, and to determine what shall be a judgment, and the legal effect of that or any other judgment, this court cannot consider themselves bound by such decisions, upon the ground that the laws upon which they are made are local in their character. It is the duty of this court, by

its decisions, to preserve the supremacy of the laws of the United States, which they cannot do without disregarding all State laws and State decisions which conflict with the laws of the United States.

Though the 13th and 14th sections of the judiciary act allows the issuing writs of prohibition, *mandamus*, *scire facias*, *habeas corpus* and other necessary judicial writs, they are limited to cases subject to the jurisdiction of the national courts. (1 *U. S. St. L.* 80, 81, and notes. 5 *Ib.* 539. Gov. Dorr, 3 *How.* 102. Barry's case, 5 *Ib.* 103.)

The State Codes of Procedure are regulated by the States.

#### CORRESPONDENCE OF PLEADINGS AND PROOFS.

SEC. 65. It is a general rule of pleading, proof and practical administration of justice, that no proofs can be regarded, in deciding an action of either party, unless they correspond with the allegations made by the party on the record. (19 *How.* 309. 10 *Pet.* 209. 4 *How.* 316. 6 *Johns. R.* 559. 4 *Mad. R.* 21, 29. 2 *Edw. Ch. R.* 209. 7 *Pet.* 274. 9 *Cond. Eng. Ch. R.* 392. 5 *Johns. Ch.* 79. 9 *Pet.* 483.)

Hence, a fact admitted by a party in pleading, cannot be controverted by proofs.

#### CONSTITUTIONAL PROTECTION OF LIFE, LIBERTY AND PROPERTY BY AMERICAN PUBLIC LAW.

SEC. 66. In Chapter IV. we have shown the principle on which the tribunals of a nation or State obtains jurisdiction *in personam* and *in rem*.

The fifth article of the amendments of the Constitution of the United States declares, that no person shall be held to answer for a capital or other infamous offence, unless

on a presentment or indictment of a grand jury, except persons in the army or navy, or in the militia, when called into actual service, in time of war or public danger; and that no person shall be twice tried for the same offence; and that in a criminal case a person shall not be compelled to testify against himself, nor be deprived of life, liberty or property without due process of law; and that private property shall not be taken for public use without just compensation. This article is a limitation of the power of the national government. The same principles are also found in most of our State constitutions as limitations upon the legislative and judicial powers of the States respectively. (See *Const. N. Y.* of 1821, art. 7, § 7. *Const. N. Y.* of 1846, art. 1, §§ 6, 7. *Const. Wisconsin*, art. 1, §§ 7—9. *Const. California*, art. 1, § 8. *Const. Tennessee*, art. 11, §§ 8—10. *Const. Vermont*, arts. 2, 10. *Const. N. Carolina Bill of Rights*, §§ 7—9, 12, and other State constitutions. *Act Cong.* 1850, p. 452, § 19.)

The national and State constitutions are declaratory of these principles of public law, and consecrate them as part of American law. According to this law, a citizen, not in the military or naval service of the United States, cannot be tried for a capital crime or felony, except on presentment or indictment, leaving *petit larcenies* and minor offences to such summary modes as the laws may provide.

In *Taylor vs. Porter*, (4 *Hill's R.* 145, 146,) Mr. Justice Bronson, with his accustomed ability and learning, declared the effect of the provision in the Constitution of New-York of 1821, that no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers, in these words: "The section was taken, with some modifications, from a part of

the 29th chapter of Magna Charta, which provided, that no freeman should be taken, or imprisoned, or disseised of his freehold, &c., but by lawful judgment of his peers or by the law of the land." Lord Coke, in his commentary upon the statute, says, that these words, "*by the law of the land*," mean "*by due course and process of law*," which he afterwards explains to be by indictment or presentment of good and lawful men, where such deeds be done in due manner or by original of the common law. (2 *Inst.* 45, 50.) In North Carolina and Tennessee, where they have copied almost literally this part of the 29th chapter of Magna Charta, the terms "law of the land" have received the same construction. (*Hoke vs. Henderson*, 4 *Dev.* 1. *Jones vs. Perry*, 10 *Yerger*, 59. See 3 *Story on Const. U. S.* 661. 6 *Barr. R.* 90, 97. 2 *Kent's Com.* 13.) The meaning of the section, then, seems to be, that no member of the State shall be disfranchised or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained, judicially, that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken. It cannot be done by mere legislation. (See 16 *Mass. R.* 86, 216, 217. 1 *How.* 277. 5 *Hill*, 359, 360.)

Nor can a judgment *in personam* be given by any State court or legislature acting judicially, pursuant to a State Constitution, against any one, so as to affect their personal rights, unless process be personally served within such State on the defendant, as otherwise the proceeding is *ex parte*, in violation of the above principles and void. (See above cases. 12 *Pet.* 623, 625. 4 *J. J. Marshall's R.* 30. 4 *Comst. N. Y. Ap. R.* 521, 522, 525. 3 *Barb. S. C. R.* 89. 12 *Pet.* 623, 733.) The court say, that no court can, in the ordinary administration of justice in common

law proceedings, exercise jurisdiction over a party, unless he shall voluntarily appear or is found within the jurisdiction of the court, so as to be served with process. Our constitutions, providing for the protection of life, liberty and property, extend to all persons within the territory of their action. The object of the barons who extorted Magna Charta was to protect the feudal rights of the nobility merely. It cannot be considered the basis of our constitutional law.

In *Corbin vs. Free Land*, (6 *How. N. Y. R.* 241,) the Supreme Court of New-York decided, that as imprisonment for debt was abolished there, that, under the Code, any fraudulent contraction of a debt, alleged with a view to imprison a defendant, must be stated in the complaint, so that it might be denied by the answer and put in issue, as, by the Constitution, a man cannot be deprived of his liberty without due process of law and an opportunity of trying the charges against him.

In *Fisher vs. McGirr et al.* (1 *Gray's Mass. R.* 1, 30—33, 35, 37, 39,) the Supreme Court of Massachusetts held, that a law prohibiting the having liquor for sale, except for certain purposes, and confiscating the illegal article, was legal; but that the Constitution of the State, prohibiting the condemnation of a man's property without due process of law, entitled him to notice to defend the liquor as his property, and a fair trial, and that he could not be compelled to testify against himself; that the article could not be seized and premises searched unless the property was proved by witnesses to be in the place to be searched, nor unless the property to be seized was described with reasonable certainty. Certain provisions were held unconstitutional and void, as violating the prohibitions of the Constitution. As the same prohibitions belong to all American constitutions, this high authority is an exposition of American law.

The Court of Appeals of New-York held the liquor



law of that State unconstitutional and void, for destroying the value of liquors legally imported pursuant to acts of Congress, and for violating the rule of our elementary law, that no man shall be deprived of life, liberty or property without due process of law. (12 *How. N. Y. R.* 242.)

SEC. 67. Our American law, found in most if not all our constitutions, forbids that a man shall be obliged to testify against himself in criminal cases. Hence, American courts hold that no man shall be obliged, as a party or witness, to answer or testify to any fact that may form part of a chain of evidence to criminate him, or charge him with a crime or penalty, or induce a forfeiture, or that may disgrace him. (4 *Wash. C. C. R.* 729. 4 *Wend.* 129. 6 *Cowen*, 254. 7 *Halst.* 79. 2 *Penn. R.* 728. 5 *J. J. Marshall's R.* 621. 13 *Johns. R.* 82. 7 *How. N. Y. R.* 57. 8 *Ib.* 41.)

In *Webster vs. Reid*, (11 *How.* 437, 439, 460,) it was decided by the Supreme Court of the United States, that the clause of the national Constitution, declaring that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," made a law of the Territory of Iowa void, as against that instrument, that prohibited trial by jury in matters of fact relative to the Half-Breed lands.

In cases where, by the common law, a jury trial was secured, and the sum in controversy exceeds twenty dollars, an act of Congress denying that right would be void. (*Ib.*)

SEC. 68. A party cannot be brought within the jurisdiction of any court by the service of process beyond its territorial jurisdiction. (*Ch.* 4, § 44.) Nor can he be brought within it by fraudulent devices and there served. (8 *Barn. & Cress.* 762. 23 *Wend.* 620. 2 *Paige's Ch. R.* 314. 2 *Sandf. S. C. R.* 717.)

Process must also be definite against some specified



party for some designated offence or civil claim, and an indefinite process is insufficient, and was so properly held by the Circuit Court of the United States, in Rhode Island, in the liquor case of *Green vs. Briggs et al.* Judge Curtis presiding, the district judge concurring.

In all American constitutions, trial by jury is guaranteed in criminal and most civil cases. In the last cited case it was also decided, that by the Constitution of Rhode Island, trial by jury in criminal cases was a right of the accused, and that, as the liquor law of that State required the accused to give security to obtain a jury trial, and in the event of a conviction, increased the penalty and punishment of the offender, it was unconstitutional and void.

SEC. 69. A trial ordinarily means a regular trial and verdict by a petit jury. Chief Justice Spencer, an eminent jurist, in the case of the *People vs. Goodwin*, in giving the opinion of the Supreme Court of New-York, so held, and ordered Goodwin to be again tried, as the jury, on his trial, disagreed and were discharged. (18 *Johns. R.* 201.)

If a person be tried and acquitted, it is final in cases of felony and misdemeanor, according to our American constitutional provision, that no man shall be twice put in jeopardy of life and limb for the same offence, and the people cannot have a writ of error in such case, though in cases of erroneous conviction a re-trial may be had on the application of the prisoner. (18 *Johns. R.* 201. 8 *Wend.* 549. 2 *Comst. Ap. R.* 16, 17.)

The principles of these sections are strongly supported by the able opinion of the court in the case of *Green vs. Briggs*, by Mr. Justice Curtis. (1 *Curtis' C. C. R.* 311.)

SEC. 70. In our State and national governments, our American constitutional law forbids outlawry and condemnations for contumacy, as well as the depriving of any

man of life, liberty or property without due process served and a regular and fair trial. (*Ib.*)

By the spirit of that law, even in proceedings *in rem*, notice ought to be served on all parties in interest within the territorial jurisdiction of the court, so far as their residence could be ascertained or was known, in order to give validity to a decree depriving them of their property. (4 *Hill's N. Y. R.* 145, and cases above cited.) In cases of non-residence, reasonable notice by mail and publication to the parties, ought to be given, so as to communicate, if possible, information to non-resident parties of the proceedings, and allow an opportunity to defend their rights. Such notice is demanded by our American law to give validity to a decree or judgment *in rem* in any court. (9 *Cranch*, 126. 3 *Sumner's R.* 600—608. The *Globe* case, decided by the United States District Court for New-York, held by Judge Conklin, reported in *Phillips' Monthly Law Reporter* for February, 1851, p. 488.)

There are some proceedings to wind up corporations, where parties are deemed duly notified without actual and personal service of notices. (18 *N. Y. Ap. R.* 200, 214, 215.)

SEC. 71. In all cases of tax sales, and other sales and proceedings authorized by statute, in derogation of common law, by which real property is taken from the owner and transferred to another, every requisite of the act, having a semblance of benefit to the owner, must be strictly complied with. All tax sales, assessment sales and others of a like nature, stand on the footing of the execution of a naked power, and the preliminary proceedings and sale, to be valid, must conform to the above rule. (*Lalor's Sup. to Hill & Denio*, p. 145.)

This rule is strongly supported by the great principle of American law, that no man shall be deprived of his

life, liberty or property without due process of law. This rule, in spirit, reaches the above class of cases, though they are not strictly within the constitutional provision.

#### PLENARY POWER OF MUNICIPAL BODIES, COMMISSIONERS, &c.

SEC. 72. Whenever the legislature confers a plenary, discretionary power for a public purpose, and provides no mode of reviewing the judgments or acts of those on whom such public powers are conferred, their judgment, within the limits of the granted authority, is conclusive and final. (2 *Selden*, 522. 4 *Comst.* 195. 3 *Ib.* 463. 2 *Denio*, 433. 21 *Barb.* 617. 4 *Wend.* 9, 21. 14 *N. Y. Ap. R.* 360, 506. 6 *Wheat.* 593, 597. 7 *Cowen's R.* 585. 13 *How. N. Y. R.* 1, 13—15. 26 *Wend. R.* 485. 7 *Pet.* 243. 10 *How.* 534.)

When such power, for a public purpose, is conferred on several, all must meet and judge, though a majority determines the action.

Hence, the regulation of streets, piers, &c., by a municipal corporation may, and must be regulated, as they deem wise, and no action lies by any one incidentally injured by the exercise of the powers conferred, and in all such cases the rule of *damnum absque injuria* applies. (*Ib.*) So, in locating and altering piers, and allowing or removing obstructions to navigation when empowered by statute. So, in locating an emigrant dépôt in a city, almshouse or a hospital.

Such powers cannot be contracted away, and every contract in contravention of such municipal statute duties are illegal and void, and they are bound to exercise them in designing, in altering and changing them as they may deem best for the public interest. (10 *How. U. S. R.* 511.) The Supreme Court of the United States, in the case of the Hartford Ferry, has declared that a State

legislature cannot divest itself of the power of regulating ferries from time to time as it shall judge best; granting and annulling at its pleasure as the public interest may require. (*Ib.* See, also, 4 *Mass. R.* 522.)

As such powers are governmental and not private, they cannot be prescribed for. (8 *How. U. S. R.* 581. 10 *Ib.* 511. 4 *Mass. R.* 522. 18 *Johns.* 230. 15 *Pick.* 242, 247, 248.)

In *Brower vs. The Mayor, &c., of New-York*, (3 *Barb.* 357,) it was held that the immunity of such a corporation, acting within its legitimate powers, depends on their acts, being of a governmental character, where the legislative power conferred by law is exerted by it, or some ministerial act is done pursuant to such authority.

A corporation, in grading streets, acts governmentally, and is not liable for injuries consequential to neighboring lots arising incidentally. (4 *Comst.* 195, 198. 1 *Denio*, 596, 597.) This principle must of necessity be restricted by constitutional limitations for the protection of property, and by the obligation to use ordinary care in executing such works. (3 *Comst. N. Y. Ap. R.* 463, 469.)

In buying and selling lands such corporations are bound by legal obligations and covenants as individuals are. (11 *Paige*, 414.)

In *Gosler vs. Georgetown*, (6 *Wheat.* 593,) the Supreme Court of the United States decided, that where a city corporation graded a street and declared it unchangeable, that it was an act of legislative power, and that the corporation could not divest itself of the power of future legislation on that subject. This proceeds on the great elementary principle that neither a State or city legislature can abnegate or exhaust its powers on any subject of legislation within its jurisdiction. The Supreme Courts of New-York and Massachusetts have held and established the same doctrine. (7 *Cow. R.* 587, 603, 604. 5 *Ib.* 538.

15 *Pick. R.* 252. 17 *Barb.* 436.) The Supreme Court of Texas has so decided. (4 *Texas R. by Hartley*, 378, 379.)

If a municipal corporation is given the streets of a city or village in charge to be regulated, permissive words of control are imperative and create a duty, and for its omission the corporation is liable to an action by a party injured. (5 *Selden*, 163.)

In *Lloyd vs. The Mayor, &c., of New-York*, (1 *Selden*, 374,) the New-York Court of Appeals decided, that the corporation of the city was responsible for the negligence of its agent, who, in repairing a sewer, left it open at night without a light or barricade, and plaintiff's horse fell into it and was killed, and judgment was given for the damages. In giving the opinion of the court, Foot, Judge, said: "The corporation of the city of New-York possesses two kinds of powers, one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty; the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter is a corporate legal individual. The legislation relative to sewers and their cleansing (said the Judge) was legislative, the execution of it by the agent was a ministerial act, and that the corporation was liable for his negligence to plaintiff's injury."

In the rail-road cases in the city of New-York, the Court of Appeals, at their December term in 1853, decided that the corporation of the city might be restrained from granting to certain persons a right to lay down a railway on a street of the city, run cars thereon, and take passage-money or tolls thereon, and the court affirmed the decision of the court below, fining the city aldermen

and imprisoning one for contempt, for voting to grant the railway after service of an injunction restraining the Common Council from making such grant.

In *Williamson vs. New-York Central Rail-Road*, (16 *N. Y. Ap. R.* 97,) decided in 1857, in the New-York Court of Appeals, it was decided, that where a man dedicated a street to the public, and afterwards a railway, by consent of the legislature of the State and of the municipal corporation, is laid down on it, and the cars run on it, and the damages of the original proprietor of the street and adjacent lots have not been assessed and paid, that the rail-road company is liable to such owner for all damages to the adjacent lots, as the dedication was for a street and not for a rail-road. The court seemed to consider that the adjacent proprietor has an interest in the land of the street to the centre, in such case.

The principle of this case seems to apply to cases where a street is made of land taken and appraised for it, as, in case of its discontinuance, half of it would go to each adjacent proprietor.

This decision re-affirms the old doctrine, that a railway, if laid upon a street or highway, subjects the company to an action for all damages consequential to the occupancy of the street by its railway.

It is obvious that the occupancy of a street by a railway may be very injurious to adjacent lot-owners, and it is just that they should be paid a loss thrown upon their lots for the benefit of monopolists.

The New-York Court of Appeals, in *Riley vs. Rochester*, (5 *Selden's R.* 64, 71,) decided that a municipal corporation, having power to hold lands and personalty for public use merely, could not take and hold lands beyond the limits of the city corporation for its use. That to hold lands beyond their limits, authority from the legislature must be specially obtained. (*Ib.*) It was held that

a special legislative provision was necessary to extend the sphere of municipal action beyond a city's chartered limits. Hence special acts are passed to enable cities to bring in water and to extend railways by subscribing to the stock, &c.

In *Kelly vs. Mayor, &c., of New-York*, (1 *Kernan*, 432,) it was held by the New-York Court of Appeals, that where the corporation of New-York had made a contract for grading a street, it was not responsible for injuries arising from the negligence of the contractor or of his servants. (See, also, 4 *Selden*, 222.)

In the *Utica* case, (17 *N. Y. R.* 104,) the same court held the city liable for their contractor's omission of care in digging a sewer and leaving it open. *Hernan's* case, (3 *Kern.* 1, and the *Lowell Rail-Road* case, (23 *Pick.* 24, 30,) and *Gas Sheffield Cons. Co.* case, (22 *Eng. Law & Eq. Cases*, 199,) are to same effect.

In *Thompson vs. Schermerhorn*, (2 *Selden's N. Y. Ap. R.* 95, 96,) the New-York Court of Appeals held, that a municipal corporation, in making improvements and charging owners of lots with expenses or assessments, must strictly follow their statutory authority, or their acts will be void.

In *Hodges vs. City of Buffalo*, (2 *Denio's R.* 110,) it was held that no city corporation, unless expressly authorized by statute, could contract to furnish entertainment for the military and others on the Fourth of July or at any time, and that such a contract made by a committee of the Buffalo Common Council, pursuant to a resolution of that body, was illegal and void.

In the New-York Court of Appeals, (3 *Comst. R.* 463—469,) *Whitelead Co. vs. Rochester*, it was decided that the city was liable for negligently and improperly making a sewer so small that it failed to carry off the water of a



stream, which set back and destroyed white lead of the plaintiffs.

In *Bailey vs. Mayor, &c., of New-York*, (2 *Denio*, 433,) in the Court of Errors, the decision was to the same effect, and the city of New-York was held liable for the damages of the plaintiff by the breaking away of the Croton dam, erected as part of the works to supply the city with water.

These two authorities seem to settle the law that injuries to property, by the negligence or misfeasance of municipal corporations or their agents, furnish a legal ground of action against such corporations. (3 *Hill*, 600, 612. 4 *Comst. Ap. R.* 195, 198.)

#### OTHER CORPORATIONS AND ASSOCIATIONS.

SEC. 73. Ordinary associations and corporations are liable for injuries to persons and property consequent upon their works or the acts of their agents.

It is a general principle that corporations or individuals exercising a lawful authority, must so use it as not to injure others, and that if they do, when the injury might be avoided, they are liable for damages. (4 *Comst. N. Y. Ap. R.* 199, 200. 3 *Ib.* 463. 5 *Barb.* 80. 25 *Wend.* 462. 21 *How.* 442.)

In *Fletcher vs. the Auburn and Syracuse Rail-Road*, (25 *Wend.* 464,) it was held by the Supreme Court of New-York, that a legislative license to a rail-road company to lay its rails on a highway or street, related only to the public property therein, to the public use and enjoyment of it, and was not intended to interfere with any private or individual interests concerned. And the court held the company liable to the plaintiff for damages for raising an embankment on the street to his in-



jury. (See 4 *Cushing's R.* 63. 1 *Am. Railway Cas.* 578, 579.)

Railway proprietors, as passenger carriers, are bound to the most exact care and diligence in the management of their trains and cars, in the structure and care of the track, and in all subsidiary arrangements necessary to the safety of passengers. (4 *Cushing's R.* 400. 1 *Am. R. Cas.* 591, 593. 3 *Kernan's R.*) All carriers for hire are subject to this rule. (*Ib.* 593. 9 *Metcalf*, 1.)

Any person lawfully carried in railway cars by invitation, though he does not pay fare, may recover for injuries arising from gross negligence of a servant of the company. (14 *How. R.* 468.)

In *Drake vs. Hudson R. R. Co.*, (7 *Barb. S. C.R.* 507, 541, 542,) the Supreme Court of New-York, the learned presiding Justice Jones giving the opinion, decided that the corporation of New-York had power to allow the Hudson River Rail-Road to lay down rails on the streets of the city of New-York, and that the proprietors of lots on such streets had no right to an injunction to prevent it as a nuisance.

That as no property was taken by virtue of the right of eminent domain, there was no right to an assessment, and no claim for compensation for consequential damages prior to entry on the streets. (pp. 542, 543.)

The court say: (p. 543,) "That the plaintiffs are entitled to compensation for any loss or damage they may sustain from the rail-road, or any of the operations connected therewith, is not denied. And whenever and as often as any such loss or damage may arise or accrue from any such cause, the plaintiffs, or such of them as may sustain the same, will have their remedy therefor by action at law against the defendants." (See p. 551.) The case of the Troy and S. R. R. Co. and the Baptist Church, affirmed

the right of action for consequential injuries arising from a rail-road. (5 *Barb. S. C. R.* 79.)

The case of *Fletcher vs. Auburn and S. R. R. Co.*, (25 *Wend.* 462,) affirms the principle that, though a rail-road company may have legal license to enter upon and occupy a street, any embankment or work thereon, injurious to adjacent proprietors, gives a right of action against the company for the damages suffered.

#### INTERPRETATION OF CONSTITUTIONS.

SEC. 74. The words used in American constitutions ought to be understood in their natural sense. Judge Johnson, in deciding the canal law of New-York to be unconstitutional, relied upon and approved the rule of constitutional interpretation laid down by Chief Justice Marshall, in *Gibbons vs. Ogden*, (9 *Wheat.* 188,) in these words: "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

In annulling the canal law, the Court of Appeals of the State of New-York applied this principle, and held the law void, on the ground that the plain meaning of the prohibitions of the Constitution of the State forbade such a law.

The whole value of our constitutions consists in their limitation and separation of the executive, legislative and judicial powers, by provisions that are permanent and easily understood by every citizen. Common sense sanctions the above rules of interpretation; and unless they

are adhered to, American constitutional law loses its certainty, and its power to protect life, liberty and property.

#### PREROGATIVE.

SEC. 75. A State is bound by its own express statute of limitations, and the doctrines of prerogative pertaining to the king do not belong to our State governments or to that of the nation. (People *vs.* Clarke, 10 *Barb.* 121, 142. Fleming *vs.* Paige, 9 *How. R.* 618.) In the last case, the Supreme Court of the United States deny that the British doctrines of royal prerogative have any existence in our national government.

#### LIABILITY OF CORPORATIONS AND OTHER PRINCIPALS FOR ACTS OF AGENTS.

SEC. 76. All principals are responsible for torts, suppressions of truth, and for all wrongful acts to the injury of third persons, as well as for negligent acts or omissions to the injury of third parties, even though the principals were ignorant of them, or had expressly forbade the agents from doing them. In the case of the Philadelphia and Reading R. R. Co. *vs.* Derby, (14 *How.* 468,) the Supreme Court of the United States laid down this doctrine. The court held that the rule of "*respondeat superior*," or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect; or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. (See,

also, *Story on Agency*, § 452. *Smith on Master and Servant*, 152. 1 *Am. Railway Cas. notes*, 127. 21 *How.* 412.) The case of the Bank of Kentucky *vs.* Schuylkill Bank, *Select Penn. Equity Cases*, by Parsons, 216, is to the same effect. In that case, President King held, that "the general rule on this subject is, that every principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, or malfeasances and omissions of duty of his agent, in the course of his employment; although the principal did not authorize, justify or participate in, or, indeed, know of such misconduct, or even if he forbade or disapproved of them. (*Story on Agency*, § 452.) In any such case, the principal holds out his agent as competent and fit to be trusted; and thereby in effect warrants his fidelity and good conduct in all matters of the agency. On the other hand, the agent is responsible to his principal for all loss or damage accruing to the principal from his omissions, commissions, frauds or torts, and bound to make him a full indemnity; and this, whether the loss or damage be direct to the property of the principal, or whether it arises from the compensation or reparation which he has been obliged to make to third persons in discharge of his liability to them for the acts or omissions of his agent." (*Ib.* § 217.) This decision of President King was affirmed on appeal, (*Ib.* 269,) and, being in accordance with the decision of the Supreme Court of the United States, these doctrines must be deemed a portion of our American law and of binding force in our Union. (14 *How.* 468. 16 *Ib.* 469.)

These doctrines repose on great natural principles of justice, which are of universal application in every country. (23 *Wend.* 260. 1 *Salkeld*, 289. *Code Napoleon*, b. 3, tit. 13, ch. 2, §§ 1991, 1992, 1994.)

It is also a principle of American law, that trustees, agents, executors and others in fiduciary positions, are

bound to act for the benefit of their principals or *cestui que trusts* exclusively; that they are liable to the parties in interest for any violation of their duty, and that the principal may set aside, as a matter of course, all sales of his property by agents where they act as secret buyers or participators in the profit of such sales; or, in case of purchases by an agent which ought to have been made for his principal, he may claim the benefit of them. (14 *Pet.* 187. 2 *Story's Com. on Eq.* 2d ed. 506, § 1261. 1 *Ib.* § 316. 5 *Paige's Ch. R.* 561. 6 *Cranch*, 148. The *Girod* case, 4 *How. R.* 503.) In *Michoud vs. Girod*, cited, the Supreme Court of the United States say: That Sir Edward Sugden's rule, as a general proposition, that trustees, agents, commissioners of bankruptcy, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, has been generally approved and is approved by the court. And the court adds, that the principle has been extended to a purchase by an attorney of his client whilst the relation subsists. (pp. 554, 555.) The court held that, independent of any fraud, all such purchases or sales by fiduciary or confidential persons were void, or created trusts in favor of the *cestui que trusts*, and might, at their option, be set aside or the trusts enforced for their benefit. (pp. 555, 556, 559. See, also, 10 *Pet.* 269. 3 *How.* 333. 6 *Paige's Ch. R.* 364. 5 *Ib.* 656.) The case of *Moore vs. Moore*, decided by the New-York Court of Appeals, is to the same effect. (1 *Selden's R.* 260.) In *Bentley vs. Col. Ins. Co.*, at the general (September, 1854) term of the Supreme Court, held by Justices Roosevelt, Mitchell and Clerke, it was decided, that an insurance agent could not

insure his own property, as he would thereby act and contract in two opposite characters.

These general principles of equity are part of our common American law, belong to English jurisprudence, and probably to the codes of most civilized nations.

#### CONTRACTS AGAINST PUBLIC POLICY.

SEC. 77. All contracts to do an illegal act, or one inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions, or which is calculated to restrict selections for office or influence the legislative, judicial, executive or other public officers, by other than public considerations of official duty, are illegal and void. Such are contracts to pay persons for influencing a State legislature to pass a law, or to refuse to pass one, or for inducing a rival to withdraw his petition for an office and prevent competition, or for using influence to obtain a pardon, or to do any act with a view to induce a public body or officer to act upon any considerations other than those of public duty. (16 *How.* 334, 335. 4 *Comst. N. Y. R.* 456, 457. 15 *Wend.* 412. 5 *Johns. R.* 334.) These doctrines form part of our American law, and are, indeed, elementary principles of the law of all civilized nations.

#### JUDICIAL RULES OF NAVIGATION.

SEC. 78. The Supreme Court of the United States has held, that a vessel sailing before or with the wind on the East River; Long Island Sound, or any like public navigable waters of our Union, must get out of the way of one close-hauled or sailing by or against the wind; and a vessel on the starboard tack has a right to keep her

course, and the one on the larboard tack must give way or be answerable for the consequences. So, where two vessels are approaching each other, both having the wind free, and, consequently, the power of controlling their movements, the vessel on the larboard tack must give way, as she can do it with greater facility and less of distance and time than the other. Again, where vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should preserve her course, while that on the larboard tack should bear up or keep away before the wind. (10 *How.* 581.) In extreme cases, these rules, from necessity, have some exceptions. (*Ib.* 17 *Ib.* 152, 170.)

Steamers, as a general rule, must, if there is a danger of collision, keep clear of sailing vessels, flatboats, &c., as their steam power enables to do. (17 *Ib.* 12, 152, 178, 443, 466.)

All vessels must observe due care to avoid collision, and if one occur by the wrongful act or omission of either, to the damage of the other, the vessel in fault must bear the loss.

#### VIOLATIONS OF DUTIES IMPOSED BY A FRANCHISE OR AN OFFICE.

SEC. 79. In *Hutson vs. Mayor, &c.*, of New-York, (5 *Selden*, 168, 169,) the Court of Appeals of New-York held, that if a municipal corporation or public officer charged with a public duty omit it to the injury of any person, an action lay against the party whose neglect or default occasioned the injury; and that permissive words in a statute are imperative in all cases where third parties or the public have an interest in the performance of such legal duty.

The same doctrine is held by the Supreme Court of the United States. (9 *How.* 259. See, also, 22 *Barb.* 400.)

A corporation, or any person using a public franchise, is limited by the statute of creation to the specific powers thereby conferred and to those necessarily incident to them; and any contract of lease or assignment, if not allowed by an act of the legislature, and every misapplication of the funds or contract to appropriate them to purposes not so specially authorized, is illegal and void; and every stockholder not assenting to such illegal act may file a bill to prevent such wrong or to compel the directors to pay damages for it, and the State is not bound, unless the legislature assents by a law, to any change of a charter or misdirection of a franchise. (23 *Wend.* 554. 13 *Pet. U. S. R.* 587, 595. 8 *How. U. S. R.* 581. 3 *Duer's R.* 120. 82 *Eng. Com. L. R.* 396, 397. 73 *Ib.* 775, 811—813. 6 *Eng. L. & Eq. R.* 106—110. 12 *Ib.* 224, 228. 13 *Ib.* 506, 516, 517. 5 *Johns. R.* 175, 176. 1 *Blackf. Ind. R.* 405. 26 *Vermont R.* 721. 14 *Illinois R.* 86, 87. 12 *How. N. Y. R.* 19. 1 *Edwards' Ch. R.* 87, 88. 5 *Paige's Ch. R.* 612. 3 *Ib.* 223, 331, 332. 3 *Louis. R.* 568. *Angell & Ames on Corp.* 3d ed. 306, 307.)

In the *Pacific Rail-Road vs. Hughes*, (22 *Missouri R.* (1 *Jones*,) 291, 298,) the Supreme Court of Missouri held, that in cases of corporations as well as of partnerships, the court will stay a majority from misapplying the funds of the company, and from changing the principles on which the partnership or corporation were, by agreement, based. But the court held, that in cases of partnership, there could be no alteration of the principles of the association in cases of private association, but that in public corporations, as rail-roads, the law authorizes the government to change the charter, with the assent of the majority, or implied assent on the part of each stockholder



to such changes, may be implied. And that a change, not fundamental, but only in aid of the substantial object, will not discharge a subscriber from his liability to pay in his subscription to the stock.

In *Tonawanda Rail-Road Company vs. Munger*, (5 *Denio's R.* 263, 264,) it was held, by the Supreme Court of New-York, that a State law authorizing the electors of towns to determine the times and manner in which cattle, sheep and horses might run at large in their respective towns, was unconstitutional and void, as the soil of the highways belonged to the owners, subject to the public easement of right of passage, and that any right of feeding on or occupying highways, except by passing over them, given by a State law and a decision of a majority of the electors, whether with or without compensation to the owners of the fee of the road, was unconstitutional, as appropriating the private property of one man to the private use of another. The court relied on 1 *Cowen's R.* 88, note. 2 *Smith's Lead. Cases*, Phil. ed. 94, 99. 3 *Kent*, 432, 434. 16 *Mass.* 35. 3 *Wend.* 142. *Taylor vs. Porter*, 4 *Hill*, 140.

This case seems to show that the allowing a majority vote of the people to interfere, in any town or city, with private rights of property therein, as to non-consenting parties, cannot aid the validity of a State law, and thus indirectly do what a State law cannot do directly.

It has been shown that a State or nation, by the right of eminent domain, may take, for a public object, and wholly or partially extinguish a corporation, with its franchise before granted, upon full compensation made according to law, and supersede it, in whole or in part, by a new public body.

## REMEDIES OF CREDITORS AND OF CORPORATIONS.

SEC. 80. Stockholders and creditors of corporations, other than municipal, are entitled to sue the directors of the company for wrongful and illegal acts to their injury, and a shareholder, at all times, or creditor of a company, may file a bill in equity to prevent a misapplication of the funds of the corporation, or, if insolvent, for an account, against such directors, for the benefit of the plaintiff and of all others standing in the same situation. (12 *How. N. Y. R.* 19, 20. *Brennan vs. Rufford*, 6 *Eng. L. & Eq. R.* 106—108. 5 *Paige's Ch. R.* 612. 3 *Ib.* 223. 3 *Louis. An. R.* 568. *Angell & Ames on Corp.* 3d ed. 1067.)

POWER OF CONGRESS OVER COMMERCE BETWEEN THE STATES,  
AND THE REGULATION OF NATIONAL CURRENCY.

SEC. 81. It is settled that Congress has power to incorporate a national bank to furnish a national currency and facilitate exchanges, and to promote our inter-state commerce and safe and easy management of the national finances. (4 *Wheat.* 316. 9 *Ib.* 738.) These decisions of the Supreme Court of the United States also finally settle that no State can pass a law taxing such bank or its branches, but that the realty owned by the bank in a State and stockholders living there might be taxed equally and in common with other like property and owners of bank stock.

These decisions of our national court proceed on the ground that Congress has power over inter-state commerce and national finances and currency, and, of necessity, has the right of choosing any means to execute them not prohibited by the national Constitution. Upon this principle, Congress might grant a charter to a corporation

to make a railway to the Pacific Ocean, if judged expedient.

As a national currency and inter-state exchanges can only be effectually provided for by Congress, the exertion of this national power, in some form, seems desirable.

#### LEGISLATIVE POWER, HEIRS AND INFANTS' PROPERTY.

SEC. 82. The property of a person upon his death descends to his heirs or devisees, subject to the payment of the debts of the deceased. They cannot alien the land of the ancestor to the prejudice of creditors in those States where land is a fund for payment of debts.

The legislature may charge lands of deceased persons with their debts to the exclusion of personal property, as the legislature regulates descents and transfers of real property, as well as the rights of debtor and creditor, as a common duty. The whole range of remedies is within legislative power. A statute may authorize a guardian to convey the lands of an infant, or may give to the infant the capacity himself to convey his property. So, State laws may provide for subjecting the lands of deceased persons to sale, on execution or otherwise, to satisfy their debts. The power is inherent in legislatures, and may be exercised agreeable to their views of sound policy. The kind of property, real or personal, that shall first be applied to the debts of deceased persons, and the mode of application, are questions of State policy, and rest in the discretion of the legislature. (16 *Pet.* 62, 63.)

#### NATIONAL, STATE AND INDIAN BOUNDARIES.

SEC. 83. National boundaries, when contested, are settled by the national executives, or the treaty-making power of each nation. The judiciary of States and na-

tions may adjudge the effect and construction of treaties so far as private rights are concerned. (12 *Pet.* 746. 15 *Ib.* 518.)

In the States of our Union the people and the States, by the Constitution of the Union, have provided two modes of settling State boundaries. Any two or more States may adjust and settle their boundaries by compact, if Congress shall pass an act assenting thereto. Without the assent of Congress, a State compact is unconstitutional and void. (*Const. U. S.* art. 1, § 10, subd. 1, 2.)

This, and section eight of the same article, show that a State has no right to resort to force to settle a contested boundary against another State, or against a territory of the United States. (Ch. 1, § 22.) As to a boundary between a State and territory, Congress and the State may, by compact, settle it.

The second constitutional mode of settling a disputed boundary between any two or more States of the Union is by a decision of the Supreme Court of the United States. (*Const. U. S.* art. 3, § 2. *Rhode Island vs. Massachusetts*, 4 *How. R.* 628. 12 *Pet.* 734, 743.) In the last case, (p. 743,) the court, speaking of their constitutional power to decide between States of our Union, held that all the States had transferred the decision of their controversies to that court. It was the judicial tribunal erected to decide controversies between two or more States, by the people and States of our Union, by a constitutional provision to prevent all belligerent acts, and furnish all our States with a judicial remedy in their State controversies. That the Supreme Court of the Union is the high court of our sovereign States, specially appointed to decide their controversies and supersede all forcible remedies. This is a most wise and valuable provision, and is calculated to preserve harmony and peace among the States composing our republic.

SEC. 84. In our Union the President and Senate, by treaty with a foreign nation or an Indian tribe, can settle conclusively all questions of national and Indian disputed boundaries; and the line so fixed concludes States and individuals as to rights of jurisdiction and property. (14 *Pet.* 13, 14. 12 *Ib.* 746.)

SEC. 85. When a national or Indian boundary is settled by the political department of the Union, the courts recognise it, and enforce the rights of individuals accordingly. (*Arredondo's case*, 6 *Pet.* 711. 2 *Ib.* 307.)

#### NATIONAL AND STATE COMPACTS.

SEC. 86. Pursuant to acts of Congress and State laws, national compacts may be made with the States for national objects, such as the establishment of freedom of navigation to all the people of the United States over navigable waters and carrying places; to exempt the lands and property of the Union from State taxation or interference; to receive cessions from States of territory upon agreement to form republican States out of it when sufficiently populous, and for forts, light-houses or any national object; to buy soil and jurisdiction of States; to settle questions of contested boundary affecting the national interests. This is a mode of adjusting our private international relations, and of declaring our private international law. Compacts made by the nation with the States are *quasi* treaties, as they treat of soil and jurisdiction, and the formation of new States of our Union with qualified sovereignties. Our national arrangement with Georgia as to the Mississippi territory, and the agreement as to the territory northwest of the river Ohio, are examples of the exercise of this high power. (1 *U. S. St. L.* 549—551, n.) The admission of Texas, the allowing a division of old States and the organization of new ones,

and making declarations of public law, are exertions of this governmental power. (*Ib.* 189, 191. 3 *Ib.* 429—431, 545—547. 2 *Ib.* 641, 642. 5 *Ib.* 797. 3 *How.* 222.)

These compacts, exempting United States lands for a short period from State taxation, and enforcing an equality of taxation, and free navigation and other principles of public law, are a peaceful and a *quasi* treaty mode of establishing our public law by State and national consent.

A compact with the United States by North Carolina and cession of the territory now forming the State of Tennessee, to be formed into a State, is one of our remarkable compacts, which is based on principles of American public law. (1 *U. S. St. L.* 106—108.)

SEC. 87. Of the same sort are State compacts when assented to by Congress; and without such assent all State compacts are unconstitutional and void. (14 *Pet.* 570. *Const. U. S.* art. 1, § 10. 4 *U. S. St. L.* 708, 709.)

This is an important principle of our public law, and essential to the unity and harmony of our republic. It prevents sectional confederacies, and *imperium in imperio* combinations of States, having some supposed or real common interest, to coerce the national authorities to submit to their will and dictation for fear of rebellion and dissolution of the Union. All attempts to organize a legal State confederacy within our Union, or to secede from it, are impossible, as they are forbidden by the Constitution; and the penalty of death impends over traitors in case of levying war for such objects.

#### LIMITATION OF STATE LEGISLATION AS TO MONIED AND OTHER CORPORATIONS, &c.

SEC. 88. Where a corporation or association has a stock, the subscribers to it contract, in effect, that their funds,

and those of the company, shall be devoted to certain declared objects specified in the fundamental articles of association; and an act of the legislature authorizing the company to apply their funds to other purposes, would be unconstitutional and void as to any stockholder not assenting to the new law and to the change. (H. and N. H. R. R. Co. *vs.* Croswell, 5 *Hill's R.* 385, 386. 8 *Mass. R.* 268. 2 *Penn. R.* 184. *Stevens vs. Rutland and B. R. R. Co.*, decided by the Chancellor of the Third Judicial Circuit of Vermont, and published January 1, 1852, in *Am. Railway Times*, Boston.) A similar decision has been made by Justice Roosevelt, of the Supreme Court of New-York. In the Vermont case, the Chancellor held that the rail-road company, so far as the stockholders were concerned, was a *quasi* public corporation, though it was public so far as the legislature, by the original charter, had conferred the power of taking land for the railway. That the extension of the railway by the amended charter of 1850, on application of the directors, changed the fundamental objects of the association, and he added, "I think it obvious, beyond a reasonable doubt, upon principle and authority, that the plaintiff is not bound in his individual rights as a corporator, by the act of 1850 and the majority vote of the corporation, without his individual assent."

The Chancellor quoted *Ellis vs. Marshall*, (2 *Mass. R.* 269,) as deciding "that no man could be made, by act of legislation, a member of an aggregate corporation without his personal consent."

Nelson, C. J., in 5 *Hill*, 385, above cited, says: That corporations can exercise no power over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent.

A consent of a stockholder to an amendment of a charter not fundamental, may be implied where additional

privileges are granted. (2 *Watts & Serg.* 156. 5 *Hill*, 388, and the Vermont case.) So, if a right to amend is reserved to the legislature, it may be done.

As to the legislative authority to change the powers of municipal corporations, so as to enable them to charge the private property of the people of a city by the force of an act of the legislature, assented to by such bodies, or by a majority of the people, with the cost and casualties of constructing rail-roads, canals or other works to a distance from cities, a variety of legal opinions seems to exist.

In *Medford vs. Learned*, (16 *Mass. R.* 216, 217,) the Supreme Court of Massachusetts, in giving their opinion said: That no legislator could have entertained the opinion that a citizen, free of debt by the laws of the land, could be made a debtor merely by legislative act, declaring him one.

In *Ellis vs. Marshall*, (2 *Mass. R.* 269, 276,) the legislature of Massachusetts passed a law incorporating the defendant, Marshall, and others, proprietors of certain Boston flats, for the purpose of making a street across the same, and authorizing the corporation, or a majority of the members at a regular meeting, to assess the different proprietors for such street, such sums as said proprietors or a majority of them should agree upon, and for non-payment of any assessment, to sell so much of the delinquent's land as might be necessary to pay the assessment, and to execute deeds therefor to the purchaser, vesting him with a fee simple title thereto. Marshall was not a petitioner or remonstrant before the legislature, and never attended any of the meetings of the corporate proprietors, though he was regularly notified to attend them. That Marshall's land was assessed for benefits like that of the other proprietors, and it was equally benefited with theirs by the street, to construct which the assessment was laid, and the



defendant's land was sold pursuant to the State law for the assessment, to Ellis, the plaintiff, and he brought ejectment to recover possession of the same. The Supreme Court decided against the plaintiff, and held that the legislature had power to take land for turnpikes, canals, &c., making compensation to the owners for their land taken, but that it had no authority to compel a man, *nolens volens*, to become a member of a corporation, and subject him to taxation against his will, for the promotion of a private enterprise like the one in question; that a man may refuse any grant offered by the government, and decline to improve his land; that though the legislature may wisely determine that a certain use of his property will be highly beneficial to him, the proprietor has a right to judge for himself and refuse the proffered improvement, and that Marshall's assent was, therefore, necessary to make the act operative on him; and that, he not having assented to it, the State law was, as to him, null and void, as well as the sale made by its authority. (pp. 276—278.) The court held that there was no evidence of an express or tacit assent, but a mere acquiescence by defendant in proceedings he could not arrest.

In *Brown vs. Hammel*, (6 *Barr. Penn. R.* pp. 90—97,) the Supreme Court of Pennsylvania decided that the legislature had no power to change trustees, setting aside those appointed by a testator's will and vesting the trust property in other trustees, without the consent of the former, and that such act was void as a violation of the constitutional provision of that State, that no man shall be deprived of his rights, except by the judgment of his peers or the law of the land, which the court expounded to mean a trial by due course and process of law. (pp. 90—97.)

The court (p. 92) held, that the legislature had power to alter charters of municipal corporations of a public

nature, as the corporations of cities and boroughs, when no private right of property is involved, except incidentally, and such as can be easily reserved and compensated. But that in reference to private corporations, a contrary rule prevailed. These, the court held, were in the nature of contracts between the government and individuals, and were within the benefit and protection of that clause in the Constitution, which enacts that a State legislature shall not make any law impairing the obligation of contracts.

The court held that the State law depriving the trustees appointed by the testator's will of the trust property, without their consent, was unconstitutional and void, and conferred no authority on and vested no title in the legislative trustees.

In *The People vs. Mayor, &c., of Brooklyn*, (4 *Comst. R.* 420,) it was decided, by the New-York Court of Appeals, that the city of Brooklyn, by its charter, was legally empowered to open Flushing Avenue, one of the streets of the city, and assess the expense of the improvement upon the owners of property benefited by it. Judge Ruggles, in giving the opinion of the court, said, that taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden, but that the taking of private property, by virtue of the right of eminent domain, had no reference to the owner's share of public contribution, and the government, by taking it, became the proprietor's debtor, and was bound to pay for it. The court held, that the legislature might have made such an improvement—a city street—a subject of city tax or of special tax, by assessment upon the owners of lands benefited, as had been done by the charter, and that it was legal and valid. The law in question was an equitable one, and was properly sustained by the court. The improvement was within the city.

It seems, from the above authorities, that a State law cannot deprive a man of his property without his consent, unless it is taken by virtue of the right of eminent domain, on full compensation, or by virtue of city taxation, for its municipal purposes, or by State or county taxation, for legitimate State or county purposes.

In *Hampshire vs. Franklin*, (16 *Mass. R.* 86,) the Supreme Court of Massachusetts affirm, as a principle in the division of counties, that where a part of a county was set off as a new county, and the law makes no provision as to the debts and property of the old county, the latter retains its municipal property and its liability for all its debts at the time of separation, and that if a law is passed, after the erection of the new county, giving to the latter a portion of the property of the old county, without its consent, the act was illegal and void, on the ground that the legislature had no power to charge one municipal corporation with a debt in favor of another. And this court held, (p. 87,) that the legislature had no power to compel a man to become a member of a corporation without his consent. (See 4 *Wheat.* 629, 694. 11 *Pet.* 642.)

But the party or corporation affected may, by appropriate acts, consent to the law, and thus make it binding. (*Ib.* 26 *Wend.* 43, 54. 3 *Pet. R.* 411.)

SEC. 89. In *Hook vs. Whitlock*, (26 *Wend.* 43, 54, 55,) it was held, by the New-York Court of Errors, that if a bankrupt or insolvent were discharged, a party protected from its effect might make the invalid discharge valid, as to him, by coming in and taking a dividend, and thereby assenting thereto. Hence, a party may waive a right secured to him by a constitution, and thereby give effect to an act that could not otherwise destroy his rights.

SEC. 90. Congress may authorize a city, town or county in the territories and District of Columbia to subscribe and

pay for stock in railways or other public works intended for the benefit of such body, and every State of our Union has the same power, unless by its constitution restrained, in their respective territories, and these bodies subscribing for and taking such stock are bound to assess and collect the necessary taxes to pay such debts. (18 *N. Y. Ap. R.* 38, 41. 3 *Kern. N. Y. Ap. R.* 143. 8 *Leigh. R.* 120. 4 *Comst.* 419. 15 *N. Y. Ap. R.* 549. 21 *Penn. St. R.* (9 *Har.*) 148.) This doctrine is established by the concurrent decisions of our State and national courts.

## CHAPTER VI.

### RIGHTS OF PROPERTY AND PUBLIC RIGHTS.

SEC. 1. Every independent State is deemed by the law of nations to be vested, not only with jurisdiction over, but also with the fee simple title in all its territory. Over the public domain, such right of property combines with a general jurisdiction, and as to private property within the limits of a nation, title must be derived from the government, mediately or immediately, by grant or recognition, by its laws. (*Vattel*, b. 2, c. 8, § 109; c. 7, §§ 79, 80, 81. 6 *How*. 531.) A State is vested with riparian and other rights appurtenant to its territory and property.

At the declaration of our independence, July 4th, 1776, each of our thirteen original States became owner of all ungranted lands within its territory, and the United States acquired title to all such lands, if any there were, out of the limits of said States, and included within the boundaries of the United States, as fixed by the treaty of peace of 1783. Where Indians occupied any such lands, their title was merely possessory and transitory. (*Ib.* 7 *Pet.* 87. 16 *Ib.* 469. 6 *Cranch*, 87. 8 *Wheat.* 573.)

Our treaty of peace of September 3d, 1783, with Great Britain, confirmed, as of pre-existing right, that title to the territory included in it, and the right of fishing, as appurtenant. (12 *Wheat.* 524, 526—528. 8 *U. S. St. L.* 80.) This treaty, the national partition deed between the United States and Great Britain, ratified the titles of the States and of the United States.

The power to grant public domain in New-York by royal governors was held to be at an end October 14th, 1775, for then British power over it ceased. Regular grants prior to that day are valid. (4 *Wheat.* 254. 8 *U. S. St. L.* 258. 17 *Wend.* 608. 16 *Pet.* 408, 409.) The same principle is applicable to all our States. (*Ib.*) The day when the new State government superseded the royal rule in each State fixes the time when the royal grants are invalid.

Our treaty of cession with France, of April 30th, 1803, conveyed to the United States Louisiana, with a right of soil to all ungranted lands therein. (8 *U. S. St. L.* 206. 2 *Pet.* 301, 312. 12 *Ib.* 367.) This cession took effect from date of the treaty, as its ratification gave it full effect as of its date. (*Post*, ch. 12. 1 *Kent's Com.* 5th ed. 169, 170.)

Spain, by treaty of cession of February 22d, 1819, ceded to the United States East and West Florida, the adjacent islands dependent thereon, and all ungranted lands. (8 *U. S. St. L.* 253.)

Texas declared her independence of Mexico March 2d, 1836, and the battle of San Jacinto of April 21st, following, made her a *de facto* and *de jure* nation. And Mexico has, by treaty with the United States of 1848, since cession by Texas, of her jurisdiction to our republic, and since she became a State of our Union, acknowledged her due separation from Mexico. (1 *Laws of Texas*, pp. 1—7. *Sess. L. of U. S.* 1848, p. 260.) As Texas retained her lands, when she thus became a State, and remained owner of all public lands within her territory which were ungranted at the time of her declaration of independence.

Mexico, by treaty, dated February 2d, 1848, granted to our republic California and New-Mexico, for the consideration of fifteen millions of dollars, and the assumption of certain debts due from Mexico to American citizens.

(*Laws of U. S.* 1848, pp. 260, 265, 273.) All ungranted lands in those territories at the date of the treaty belong to the public domain of the United States. Indeed, as both of those States were conquered, all grants made by the Mexican republic afterwards, are invalid; as by conquest title had passed to the United States, subsequently confirmed by the treaty of peace. (4 *Wheat.* 254. *Post*, ch. 12.)

Our partition treaty of 1818 defined our fishing rights on the coasts of British America, originally secured by our treaty of 1783. (8 *U. S. St. L.* 248.)

By our treaty of partition with Great Britain, of June 15th, 1846, the extensive territory of Oregon, on the Pacific Ocean, was divided between Great Britain and the United States; the northern limit of our possession being fixed at the parallel of latitude 49° north, extending to the middle of the channel on that latitude, between the continent and Vancouver's Island, and thence along the centre of the same to and through Fuca's Straits. (9 *U. S. St. L.* 86.)

The islands in Puget's Sound belong to our republic. The main ship-channel lies between San Juan and Vancouver's Island. As the general partition line was latitude 49°, it is clear that it ought only to deflect south to the centre of the first main channel, and follow it to the ocean.

The right to certain actual possessions of the Hudson Bay Company, and of certain other British subjects, was reserved to them, as well as the free navigation of the Columbia River, subject to our control of same. With these small reservations of a transitory nature, all of Oregon, south of the boundary line, was added to the public domain of the United States. Those British reserves must end with the charter of the company; and the treaty, without exception, established our jurisdiction over all Oregon south of such line of partition. The

separate title of our Union takes effect from the date of the treaty.

Our treaty with Great Britain of 1842 adjusted our northeastern boundary and all questions of title. (8 *U. S. St. L.* 573, 574.)

Title to public domain of a country can only be derived from an existing government, uniting jurisdiction to possession and ownership of the soil, and no grant by a State or nation is valid unless it be by or to a State in possession. (12 *Wheat.* 527, 528. 2 *Pet.* 253, 309. 3 *How.* 228, 760.) Hence, all grants made by a dispossessed nation, except to a possessing State, of lands or territory claimed by it, are void; unless upon a settlement of boundaries or upon peace, the granting power shall be restored to its possession and title. If the boundaries are disputed, and on settlement of limits, if the granted land falls without the territory of the granting nation, all such grants are void, unless the treaty ratifies such titles, as was done as to certain British titles in Oregon by the treaty of 1846, by the treaty of peace of 1783, and by the 9th article of Jay's treaty of 1794.

The national Supreme Court have held, (2 *Pet.* 307, 314. 12 *Wheat.* 523, 528. 12 *Pet.* 517, 521,) that the courts of the Union follow the action of the President, or the President and Congress, on all questions of national boundary, and hold all grants and mortgages of lands within our national limits void.

SEC. 2. Long, uninterrupted, exclusive and peaceable possession of a country establishes and perfects a nation's title to its territory, as well as cessions by treaty. (5 *How.* 426. 20 *Ib.* 587. 16 *Pet.* 367, 409. 14 *Ib.* 345.) Hence, if islands lie without a nation's maritime curtilage, they do not, by mere contiguity, belong to it; and if they are uninhabited, it seems that prior discovery and exclusive



occupancy, as far as practicable, accompanied by assertion of exclusive ownership is necessary to title.

SEC. 3. Conquest, perfected by treaty, or by long and continued complete possession, and discovery and occupancy, give title to State or nation over territory. (*Spark's L. Franklin*, vol. 9, pp. 131, 132. *Ib.* 1 *Pet.* 542.) This principle is applicable to our Union and its States.

Cession or conquest does not affect private rights in the soil already vested, (7 *Pet.* 86—88,) nor can a foreigner be divested of his title by the expiration of the treaty authorizing it. (2 *Wheat.* 267. 8 *Pet.* 444, 445, 451. 15 *Ib.* 198, 199.)

The United States and the States respectively are estopped to claim title to lands or immovables, by acts of Congress and State laws and resolves, and by recognitions of individual titles as valid by agents acting with official authority for the national and State governments respectively. (16 *Pet.* 232, 262. 1 *How.* 99. 10 *Barb. R.* 121, 142, 149. 14 *Pet.* 365. 13 *Ib.* 133, 134. 10 *Ib.* 322. 2 *Ib.* 230, 231. 7 *Ib.* 85, 89, 90, 92, 93. 6 *Ib.* 691, 706, 727. 5 *N. Hamp. R.* 280—285. 7 *How.* 660. Trinity Church case, 4 *Sandf. Ch. R.* 728, 729. 6 *Pick. R.* 414. 3 *Ib.* 224. 10 *Johns.* 414. 15 *Wend.* 130, 131. 18 *Ib.* 13. 10 *Johns.* 417. 8 *Barb. R.* 293. 10 *Ib.* 132, 140. 4 *Pet.* 87, 88.)

The case of *The People vs. Van Rensselaer*, decided by the New-York Court of Appeals, December Term, 1853, is to the same effect.

Treaty recognitions of our republic bind our national and State governments according to their tenor, and give validity to incomplete titles, at the date of a treaty of cession or treaty of peace, to the extent of their stipulations. But no title declared invalid by our treaties can be upheld by our courts, unless it has been confirmed or its validity affirmed by an act or resolve of Congress, or

by a tribunal, commissioners or agents of the national government, empowered to act on the subject and to ratify such titles. (16 *Pet.* 143, 228, 231, 232. *Arredondo case*, 6 *Ib.* 707. 12 *Ib.* 484.)

In the case of the *United States vs. Arredondo and others*, (6 *Pet.* 748,) the Supreme Court of the United States decided, that the Florida treaty took effect from its date as between the two nations, Spain and the United States, but that its effect as to the time allowed for completing by individuals inchoate titles to lands dates from its due ratification. The court say, that it related to its date as between the two governments, so far as respects the rights of either under it, was undoubted, but as respects individual rights, in any way affected by it, a very different rule ought to prevail. (Cited and approved 10 *Pet.* 323. 12 *Ib.* 476, 484.)

In the *Arredondo case*, (p. 27,) the court lay down the rule that ought to govern our tribunals in ascertaining the effect to be given to grants to individuals, inchoate or complete, of a foreign government, by its governors or officers prior to our acquisition of the territory, by treaty of cession or revolutionary conquests, in which such grants are situate. Referring to the acts of Congress of the United States touching French and Spanish grants, the court say, that the United States submitted to the principle which prevails as to all public grants of lands or acts of public officers in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles; which is, that the public acts of public officers, purporting to be exercised in any official capacity and by public authority, shall not be presumed to be an usurped, but a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers, claiming and exercising the right of disposing of

the public domain, did it by order and consent of the government in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country, especially in the States whose tenures to land depend on every description of inceptive, vague and inchoate equities, rising in the grade of evidence, by various intermediate acts, to a full and legal confirmation by patent under the great seal. The court add, (pp. 728, 729,) that the judicial decisions relating to the land controversies of Virginia and North Carolina, show the universal adoption of the rule, that the acts of public officers in disposing of public lands, by color or claim of public authority, are evidence thereof, until the contrary appears by the showing of those who oppose the title set up under it, and deny the power by which it is professed to be granted. Without the recognition of this principle there could be no safety in title papers, and no security for the enjoyment of property under them.

The court add, (p. 728,) that a patent under the seal of the United States or a State is conclusive proof of the act of granting by its authority ; its exemplification is a record of absolute verity. (*Patterson vs. Winn*, 5 *Pet.* 241.) That the grants of colonial governors, before the revolution, have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof, in absence of any to the contrary, (subsequent to the grant) of the royal assent to the exercise of his prerogative by his local governors. (*Ib.*)

The court decide that public grants of public domain in a province or colony permitted by the king, by his silence, and acquiesced in by its tribunals and officers, must be held valid.

The court (p. 729) add, that it is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion within the authority and power conferred.

The court held that the power of the governor of a conquered province depends on the jurisdiction over the subject-matter delegated to him by his instructions from the king, and the local laws and usages of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given and not limited, all acts done in its exercise are legal and valid; if there is a discretion conferred, its abuse is a matter between the governor and his government, &c. (*King vs. Picton*, late Governor of Trinidad, 30 *St. Tr.* 869—871. 6 *Pet.* 629. 8 *Barb.* 279—281. Trinity Church case, 4 *Sandf. Ch. R.* 733, 734, 738.)

A grant by a British colonial governor, though not signed or against the law, if made, and an adverse possession taken under it, and continued until a statute of limitations run upon it, divest the title of the government, and the act of the governor was held that of a viceroy and not that of an agent. (4 *Sandf. R.* 733—738.)

These doctrines of the Supreme Court of the United States and the courts of New-York establish the validity of all customary and allowed French, Dutch, British, Spanish and Mexican grants or patents of lands in the United States, by colonial or provincial governors or authorities, granted during their respective administrations to individuals or corporate bodies, prior to our revolution, and prior to the various cessions to our republic of Louisiana, Florida, California and New-Mexico. (6 *Pet.* 628, 629.

Livingston Manor, 8 *Barb. R.* 278, 279. 17 *Wend.* 608. 7 *Pet.* 87, 88. 16 *Ib.* 408, 409.)

Grants of public domain made by the officers of a government in full possession and uniting jurisdiction with title, if made prior to a conquest or cession of territory, must be held valid by a government succeeding to the political and proprietary rights of the former by such conquest or cession. As treaties, when ratified, take effect from their date, they retroact and defeat all grants made by the ceding nation after its date and before ratification. (9 *How.* 289.)

Great Britain claimed the territory of the thirteen colonies, now part of the United States, by prior discovery and occupation. But as to New-Netherlands, afterwards the colony of New-York, it is clear that the original settlement and government of the colony were Dutch. It was conquered by the English in 1664, and in the articles of capitulation it was agreed that the Dutch law of inheritances should continue. The Dutch reconquered the colony; but by the treaty of Breda, of 1674, the British title was confirmed, and the Dutch delivered possession of it to the British governor, October 31st, 1674.

Upon a cession of territory the government grantee acquires no title to private property, including all public domain actually granted by any prior sovereignty over the territory which at the time of such grants united sovereignty, title and possession. Where, however, an incipient, equitable title has been granted, but not completed prior to the cession, which the former government is in conscience bound to perfect into a legal title, the United States, or any government succeeding to the rights and duties of the former sovereignty, is bound to complete it. (13 *How.* 257, 258, 261. 8 *Ib.* 305—307. 11 *Ib.* 96.)

A grant from the United States, or a State, to indivi-

duals or to bodies corporate, of the public domain owned by them respectively, at law gives a complete title to the grantees; and such patents cannot be attacked collaterally for any defect in any preliminaries on which it is founded, provided the patent is not void on the face of it. (19 *How.* 323. 6 *Pet.* 332, 342, 627. 13 *Ib.* 450. 6 *Cranch*, 87. 5 *Denio's R.* 389, 398—400. 10 *How.* 348. 18 *Ib.* 418. 7 *Wheat.* 122, 234. 6 *Cow. R.* 281. 12 *Johns.* 81, 82. 15 *How.* 433, 358. 20 *Ib.* 589. 16 *Ib.* 48. 19 *Ib.* 31. 8 *Barb.* 277, 278, 285, 286.)

A grant or patent of national or State domain, by persons unauthorized by law, is of course void. Title to parts of the national or State domain depends on acts of Congress and State laws. (15 *Pet.* 407. 14 *Ib.* 526. 13 *Ib.* 498, 644. 7 *How.* 185. 17 *Ib.* 82.)

Where, however, a State having no title, conveys real property not owned by the State, the patent or grant is void. If the State owns part of the land, it will be good as to that. (8 *Barb.* 283, 284.)

The United States or a State making a grant by mistake or from deception, may bring a *scire facias* against the grantee or his heirs to vacate the patent, or grant by statute or by agents, but the United States or State alone can institute this proceeding in cases where they have respectively made improvident grants. (*Jackson vs. Hart*, 12 *Johns. R.* 80. 5 *Denio's R.* 398—400. 8 *Barb.* 298.)

But if a pretended creditor of the Union or of a State obtain stock or land scrip in payment by false representation, the wrong-doer may be sued for the same in equity or at law for the price and interest, and assumpsit will lie, and may be united with a count on the fraud. (3 *Dall.* 375.)

SEC. 4. It is the province of the political authority of nations to settle by treaty all questions of national boundary. And when fixed, it concludes all dependent States,

corporations and individuals as to titles to land ; and any grant or cession made by either nation beyond its boundary as determined by the treaty will be void, unless it is declared valid by the treaty.

This doctrine is applicable to the United States ; and a boundary settled by a treaty, which is the supreme law of the land, concludes any adjacent State of the Union, and all persons claiming title to lands in such disputed territory. (14 *Pet.* 14. 11 *Ib.* 1, 19. 12 *Ib.* 720, 743. 5 *U. S. St. L.* 797.)

In *Lattimer vs. Potect*, (14 *Pet.* 14,) the Supreme Court of the United States say, it is a sound principle of national law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional powers, neither the rights of a State nor those of an individual can be interposed.

Among States of our Union disputed boundaries may be settled by a compact of the contesting States assented to by act of Congress, (4 *U. S. St. L.* 708, 709. 12 *Pet.* 748,) or by decision of the Supreme Court of the Union. *Rhode Island vs. Massachusetts.* (12 *Ib.* 720.) And when the boundary is so fixed or decreed, it concludes States and individuals, according to its stipulations as to titles, as above stated. (4 *Dall.* 304, 309. 14 *Pet.* 410.)

Acts of a State recognising a State boundary will be considered as fixing it as against the State. (2 *Pet.* 230, 231.)

The Supreme Court of the Union applies the same rules to the decision of the boundaries of States as to lines of separate tracts of land owned by individuals. (12 *Ib.* 734.)

Where a State grant is for lands partly within its limits,



and partly beyond the Indian boundary or the State limits, it would be good for part and bad for part. (2 *Pet.* 216, 235.)

All holders of titles to lands must derive them from the government actually owning and possessing them in full sovereignty when granted; and then, according to the principles before laid down, such rights of private property in the soil remain unaffected by change of sovereignty, by conquest, by State compact or by treaty cession. (9 *How.* 603, 614.)

SEC. 5. The dividing line, as to right in the soil under water and islands, as well as to jurisdiction of two nations bordering on the opposite sides of a navigable lake or river, is the middle of the lake or river, if there is no treaty fixing it otherwise. And if any gradual accretion of land on either side is formed, as islands, or additions to them and to the shores, it still leaves the middle of the lake or river thus changed the boundary of the contiguous nations. (*Ch.* 1. 5 *Wheat.* 379, 380. 10 *Pet.* 717. 17 *Wend. R.* 597, 598.)

If the whole river belongs to one nation, the right of the nation owning the river and its bed extends to low-water mark on the opposite side. (*Ib.*)

If the lake or river entirely abandons its bed, the old line remains. (*Ch.* 1. 17 *Wend. R.* 598.)

But neither adjacent nation has any right to erect works to increase such alluvion, or change the channel or current of the dividing waters where they own in common, or each owns half of the bed of such lake or river. (*Ib.*)

The doctrine of this section is applicable to the States of our Union; and though the States may, within their jurisdiction respectively, erect piers, ferries, wharves and works to improve such navigation, they can legally do nothing to change the channel, to abrade the opposite banks, to alter the natural depth of water, to accelerate



the current, or in any manner to impede the navigation, to the injury of an adjacent State, or of any vessel navigating such natural navigable waters. (*Oh.* 1, § 5.)

SEC. 6. Every nation and State, by virtue of sovereignty, is deemed the original owner of the soil of its territory, with its curtilage, if any, of the soil under great lakes, naturally and nationally navigable rivers, straits, bays, and under such curtilage, and the fisheries thereon, as well as all islands within the boundary of such State or nation. (16 *Pet.* 367, 408, 410. 2 *Binney*, 476. 17 *Johns.* 608, 610. 2 *Selden's Ap. R.* 522. *Wheat. Hist. L. N.* 577, 578. 1 *Wend.* 260, 261. 6 *Cowen's R.* 376. 4 *Wend.* 9. 3 *How.* 213, 230.) In our republic the ownership of the soil under the sea and lake curtilage of our maritime States is in the States, but subjected to national and foreign rights of nations, regulated by acts of Congress and by treaties. (*Ib.*) In our Union, the territorial rights of every sort passed from Great Britain to our State and national governments.

Our reciprocity treaty of 1854 has secured to Americans important fishing rights, with liberty to take fish within the curtilage of the British northeastern colonies, land and dry fish, respecting private property; and corresponding liberties of fishery, &c., as far south as north latitude 36°, are conferred on the British colonists. These rights are common to both parties, subject to the treaty limitations. (See Treaty, in Appx.)

In *Martin vs. Waddell*, (16 *Pet.* 410,) the Supreme Court of our Union say: That when the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their common use; subject only to the rights since surrendered by the national Constitution to the general government. (See, also, 4 *Selden's N. Y. R.* 472.)

SEC. 7. The States of our Union are all equal in rights, and each State owns the soil under the nationally navigable waters within it, and the fisheries thereon, and the soil under water within the maritime curtilage around its coasts and the shores of its islands, and the fisheries thereon; and each State may exclusively regulate that subject for fishing, wharves, &c., subject to the national paramount right of free and unimpeded navigation. These doctrines are applicable to our great lakes, gulfs and bays, as well as to our navigable rivers, whether the tide ebbs and flows in them or not, and the dividing line between the owners of the shores and of the soil under water owned by a State, is ordinary high-water mark. The land between high and low-water mark in this country belongs to the State within which it lies, and in England it belongs, by the common law, to the king. The ordinary monthly flow and reflow of the ocean tides marks the shore limit of ordinary high-water mark. (27 *Eng. L. & Eq. R.* 242, 245, 247—249. 4 *Wend. R.* 9. *Ch.* 3, §§ 11, 16, 20. 3 *How. U. S. R.* 213, 230. 1 *Ib.* 99. 3 *Gray's Mass. R.* 269, 270. 4 *Mass. R.* 144, 145. 4 *Selden's N. Y. R.* 470. 6 *Cowen's R.* 376. 1 *Wend. R.* 258—262. 15 *How. U. S. R.* 426, 432. 20 *Pick.* 192, 193. 11 *Barb.* 256. 2 *Binney's R.* 476. 6 *Barb. R.* 265. 7 *Penn. R.* 201, and Genesee Chief case, 12 *How. U. S. R.* 443.)

Title to soil under such navigable waters, before and after reclamation, and to fisheries belonging to a State, must be derived by special grants from the State or from some general State law. (*Ib.* and 4 *Mass. R.* 144, 145. 27 *Penn. St. R.* (*Casey*, 3,) 310. 18 *How. U. S. R.* 74. 17 *Ib.* 426.)

When a State is organized out of our national territories it becomes vested with such rights to soil and fisheries, and Congress cannot grant any land below such ordinary

high-water mark. (Pollard's Lessee case, 3 *How. U. S. R.* 213, 230, and above authorities.)

The general jurisdiction of a State covers all bays and navigable waters within its jurisdiction, and its legislature may pass all needful laws of a police character relating to their use, for fishing or for any other purpose, subject to the national right of navigation of all navigable rivers, great lakes, gulfs, bays, inlets and maritime curtilage of the coasts and islands of a State. (18 *How. U. S. R.* 74, 75. 3 *Gray's Mass. R.* 268.)

In *Dunham vs. Lamphere*, (3 *Gray's R.* 268,) the Supreme Court of Massachusetts decided, that the right of fishing on the sea-coast, and in the bays, coves and arms of the sea, was an important maritime privilege; that Grand Island was part of the territory of the State, and that being a sea island, the State territory extended from it seaward a marine league or three geographical miles from the shore, and that, in ascertaining the line of shore, this limit does not follow each narrow inlet or arm of the sea; but the rule is, that when the inlet is so narrow that persons and objects may be discerned across it by the naked eye, the line of the territorial jurisdiction stretches across from one headland to the other. The court held, that Massachusetts had municipal authority to regulate fisheries by statute in such waters, to the full extent of its municipal jurisdiction.

SEC. 8. Where two nations own portions of great lakes or of seas, embosomed in their territory, with an outlet like the St. Lawrence, not naturally navigable to and from the sea by maritime vessels, each nation owns the soil under water below ordinary high-water mark, and fisheries within its territorial limits, subject to a common right of navigation of such waters, divided only by an imaginary line; and so, by treaty and custom, Great Britain and the United States occupy the great lakes and straits divided by the

national boundary. (8 *U. S. St. L.* 574, 575, arts. 3—7.) Other nations in such a case may be admitted or excluded from the commerce of these inland waters. As vessels are departing from Chicago to Liverpool and other sea-ports and returning, the former policy is giving way to new views. At present the great lakes are open to the commerce of these two nations only.

Where a strait or narrow sea is divided between two nations and connecting with an ocean or sea, each nation owns the soil to the extent of its territory, subject to the right of all nations freely to navigate them. (See *Mr. Upshur's Report to the President*, November 24th, 1843, and *Mr. Webster's* of May 24th, 1841.)

SEC. 9. Every State is deemed to own the soil of all islands adjacent to its coasts, though unoccupied, if two marine leagues will reach from the islands or island to the shore of the main land. In that case, the soil under water between the island and the main land, and to the extent of the maritime curtilage seaward from the island, would belong to the adjacent nation. A nation owning an island beyond two leagues from its shores, would be entitled to the soil under water around the island to the extent of a three-mile curtilage.

This is the public law of our States and Union, and it is applicable to our maritime United States territories and to the States.

As to what is to be deemed the shore, small islands, formed of mud and trees, or deposit of a river like those at the mouths of the Mississippi, are deemed part of our coasts.

SEC. 10. A nation, in reference to every other nation, owns all the artificial works within it, though under its laws individuals or corporations may own them. Such works are railways, canals, telegraphs, &c. And the gov-

ernment may authorize discriminating tolls between foreigners and citizens according to Vattel.

In the United States a discrimination may be made in tolls on State roads, canals, &c., as between citizens of the State and of the Union and foreigners. A State may vary its tolls on commodities as it pleases.

A discrimination between foreigners and Americans is anti-commercial, impolitic and unfavorable to a harmonious intercourse of nations and of our States, and ought not to be adopted.

American citizens, incorporated by a law of the State of New-York, in 1849, (*Sess. L. 407*,) have constructed a railway across the Isthmus of Darien or Panama. We trust that our doctrines will be illustrated in its management. By treaty of 1848, with New-Granada, that country guarantees the neutrality of the Isthmus, and secures our citizens the protection of the United States and of New-Granada. (*U. S. Sess. L. 1848*, p. 255.)

The Panama Railway is an American work, though cosmopolitan in its utility, and deserves the protection of our republic. American transit companies and canal and railway companies, to facilitate intercourse across the Tehuantepec and Nicaragua inter-oceanic passes, are all entitled to the same protection.

SEC. 11. A nation, in reference to other nations, is deemed the owner of all the property of its citizens, as well as its public domain or property, wherever situate; and it is its duty to protect all property and personal rights of its citizens from the unlawful action of the authorities of foreign nations. (2 *Cranch*, 64. *Wheat. Int. L. P.* 2, c. 4, §§ 1—3; P. 4, c. 4, §§ 3—5. 5 *Wheat. R.* 385.)

Americans have obtained valuable concessions from Mexico across Tehuantepec, with a right of Americans,

their mails, property and troops, to pass free from control of the local authorities.

All nations have a right of free passage over all narrow passes dividing seas, oceans and great lakes across such an isthmus as Suez, Tehuantepec, Nicaragua and Darien. The freedom of the great waters draws after it to all navigators thereon the cosmopolitan privilege to pass any narrow strip of territory with mails and property for any peaceful object. The right must be exercised so as not to injure private rights. But no local jurisdiction can refuse such free passage.

**PUBLIC DOMAIN—HOW CHANGED TO PRIVATE PROPERTY.**

**PRIVATE PROPERTY UNAFFECTED BY CHANGE OF JURISDICTION.**

SEC. 12. In *Strother vs. Lucas*, (12 *Pet.* 437,) the Supreme Court of the Union say: That every country has a common law of usage and custom, both local and general, to which the people, especially those of a conquered or ceded one, cling with more tenacity than to their written laws, and all sovereigns respect them; that no principle can be better established by the authority of this court, than that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power; that the principles on which it rests are believed to be too deeply founded in law and reason ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes on himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud. (8 *Pet.* 452, 453, 455, 464. 9 *Ib.* 134, 734, 735. 6 *Ib.* 727. 10 *Ib.* 331.) The court add, (p. 438,) that the same rule applies to the

judicial proceedings of local officers to pass the title of land according to the course and practice of the Spanish law in that province of West Florida. (8 *Pet.* 310.) Where the act done is contrary to the written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein; and according to some order known to the king and his officers, though not to his subjects. (7 *Pet.* 96. 8 *Ib.* 447, 451, 454, 456.) And courts ought to require very full proof that he had transcended his powers before they so determine it. (9 *Pet.* 734.) That in following the course of the law of nations, this court has declared, that even in cases of conquest, the conqueror does no more than displace the sovereign and assume dominion over the country. (7 *Pet.* 86. 10 *Ib.* 720.) By cession, the court say, the king cedes only that which belongs to him; lands he had previously granted were not his to cede. (12 *Pet.* 438, 440. 15 *Ib.* 182.)

In *Strother vs. Lucas*, (12 *Pet.* 440,) the court say: That in re-affirming the doctrine of *United States vs. Smith*, they hold that as to what is to be deemed private property by an inchoate grant of public domain, it depends on the question whether, in the given case, a court of equity could, according to its rules and the laws of Spain, consider the conscience of the king to be so affected by his own or the acts of the lawful authorities of the province, that he had become a trustee for the claimant, and held the land claimed by an equity upon it, amounting to a severance of so much from his domain, before the 10th of March, 1804, in Missouri, and the 24th of January, 1818, in Florida; the periods fixed by the law of Congress, in one case, and the treaty in the other. (10 *Pet.* 36, 330, 331, 722.)

A completed grant, or such an equitable and incomplete



grant of part of the public domain of a country, binds a government succeeding by cession or conquest, to jurisdiction over the territory of such granted portion of the public domain. (13 *Pet.* 133. 14 *Ib.* 349, 350.)

Courts of justice have sole jurisdiction to adjudge what land has been granted and separated from the public domain. (15 *Pet.* 182.)

#### RIGHTS IN SOIL UNAFFECTED BY CHANGE OF STATE JURISDICTION, &c.

SEC. 13. The principles of the law of nations, as we have shown, allow the political sovereignty of a conquered or ceded country to pass to the acquiring or conquering nation, without affecting in any manner private rights in the soil of such country.

The same doctrine is applicable to the States and territories of our Union.

If a new State is formed out of an old one, or out of parts of two or more States, with the assent of the State legislatures and of Congress, the political government alone is changed, and all rights in the soil, whether by completed grants or inchoate ones, or by legal lien, remain unaffected by the change of State sovereignty. The rule is the same in its application to the District of Columbia and to the territories of the United States. (1 *Wheat. R.* 281, 282. 12 *Pet.* 438.)

The same principles of public law secure to the United States all lands situate within new States, which belonged to the general government when the new State was formed out of national territory. The reservations usually inserted in acts of Congress, relating to the United States public domain organizing new States, are declaratory of our public law, and of the effect of our constitutional pro-



vision relative to the national public domain. (United States *vs.* Chicago, 7 *How.* 185. 5 *U. S. St. L.* 743, § 7.)

In ascertaining what land has been separated from the public domain of a State or of the Union, the principles applicable to nations apply. And *prima facie* all grants made and patents executed by the customary granting officers or body, whether it be the executive, legislative or commissioners, are valid; and the party asserting the illegality or invalidity of the grant, must prove it in the mode and by the proceedings prescribed by the *lex fori*. (Arredondo's case, 6 *Pet.* 726—730.)

#### TRANSFER OF UNITED STATES PUBLIC DOMAIN.

SEC. 14. Titles to any part of the public domain of the Union can be passed to individual citizens or foreigners only pursuant to the laws of the United States, and no State law can declare the effect of a certificate of a register or other officer as to transferring title from the United States. Acts of Congress, and acts done pursuant to them, are the only tests of national grants and of their legal effect. Upon this principle, in *Wilcox vs. Jackson*, (13 *Pet.* 450—517,) it was decided by the Supreme Court of the United States, that, where a register and receiver allowed a pre-emption right to a lot not subject to pre-emption, and received payment and gave a certificate to the purchaser, no title passed; and that any State law declaring such certificate evidence against the United States of title, when by acts of Congress the patent alone or an express act of Congress is necessary to pass the title, is unconstitutional and void. It was held, that the power to dispose of the public lands is exclusively in Congress, and hence no State law can interfere with their disposition. (See, also, 14 *Pet.* 537. 4 *Wheat.* 422. 1 *Pet.* 542.)

All acts of United States officers, relative to the national public domain, not authorized by act of Congress, are void. (14 *Pet.* 421. 13 *Ib.* 511.)

Where the title has been granted and completed by patent or act of Congress, and there is a conflict of claims and equities, these may be decided upon by the State courts according to the State law, provided it be not in conflict with any act of Congress. (13 *Pet.* 317. 1 *Ib.* 655, 664. 2 *How.* 284.)

And the Supreme Court of the Union, on appeal from a State court, will follow such State decisions and State laws. (1 *Pet.* 654, 664.)

Where a portion of the public domain has been sold and paid for, and an official certificate has been given therefor, it becomes subject to State taxation, as individual property; though the patent may not have issued for it to the purchaser, he being the equitable owner and the United States holding it in trust for him. And such equitable ownership may be recognised and protected by State laws, and it may be sold on execution, and may descend to a man's heirs, or be devised according to the *lex loci*, the State law. (3 *How.* 461, 463. 4 *Ib.* 17, 19.)

In *Bagnell vs. Broderick*, (13 *Pet.* 450, 451,) the Supreme Court of the United States held that Congress had the sole power to declare the dignity and effect of titles emanating from the United States; and that the national legislation made the patent superior and conclusive evidence of legal title. But the court said they had no doubt of the power of the States to pass laws authorizing purchasers of lands from the United States to prosecute actions of ejectment, upon certificates of purchase, against trespassers on the lands purchased; but we deny (say the court) that the States have any power to declare certificates of purchase of equal dignity with a patent. Con-

gress alone can give them such effect. (See, also, 13 *Pet.* 416, 417.)

A patent by the government to an individual or corporation, pursuant to a statute, appropriates land, and severs it from the public domain. Any preliminary steps required by law, are cured by the patent, and the patent takes effect from its date, and is conclusive against all those whose rights did not commence previous to its emanation. Courts of equity have considered an entry the commencement of a title, and have sustained a valid entry against a patent founded on one of a prior defective entry, if issued after such valid entry was made. They have never sustained an entry made after the date of the patent. (12 *Wheat. R.* 214.)

Hence the Supreme Court of the United States have held, that if a patent is fair on its face, the court will not look behind it for irregularities. (*Ib.* and 12 *Pet.* 298.) The death of a grantee, when the patent issued, is an extrinsic fact, not impairing the equity of those who as heirs, devisees or assigns, are entitled to the land. (12 *Pet.* 298, 299.)

Hence the same court has adopted the rule, in determining what grants of former governments are valid in territories and States ceded to our Union, and that the acts of an officer to whom a duty was assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power; and that those who would controvert a grant executed by lawful authority, with all the solemnities required by law, must prove that the officer transcended the powers conferred upon him, or that the transaction is tainted with fraud. (12 *Pet.* 437, 438. 8 *Ib.* 452, 453, 455, 464. 9 *Ib.* 134, 734, 745. 6 *Ib.* 727. 10 *Ib.* 331. 2 *How. U. S. R.* 318, 319.)

The same rule applies to legal proceedings of local offi-

cers necessary by former foreign law to pass titles. (12 *Pet.* 438. 8 *Ib.* 310.)

A grant may be made by a patent pursuant to law, or it may be made by a statute, or it may be confirmed by a statute, and thus the land may be separated from the public domain.

If a patent is not issued pursuant to law, it is void and passes no title. (2 *How. U. S. R.* 318.)

If a patent has been given of public land by a State or national government, the grantor may institute proceedings and set aside for fraud, but a third person cannot in ejectment raise the question of fraud collaterally. (19 *How.* 323.)

It follows, from these authorities, that all title to the public domain must be made under and pursuant to acts of Congress; and that no State law can regulate or declare the effect of an inchoate title or official certificate of sale; but it may protect an equitable title to public lands by laws not in conflict with acts of Congress.

#### TRANSFER OF STATE PUBLIC DOMAIN.

The same principles apply to sales and transfers of public lands owned by the States. The laws of the States, respectively, declare in what manner and by whom the public lands shall be sold and conveyed, and the effect of all inchoate transfers and patents. These laws of the respective States regulate exclusively transfers of public lands lying within their limits, except where acts of Congress, donating lands to States, have prescribed conditions relating to their transfer, price, &c. In such cases the conditions must be complied with to make a perfect title. Where States own lands in other States, they hold as ordinary proprietors, unless a compact between the two States, or between a State and the United States,

shall otherwise provide. In such case the *lex loci* prevails as to the mode and solemnities of transfer, (10 *Wheat.* 192,) and the law of the proprietor State regulates the terms of sale, and by whom it shall be sold, price, &c. These must be complied with to transfer a perfect title.

In all cases where the State officer, conveying State lands, has no legal authority, or the State does not own the lands sold, the transfer is void. (5 *Wheat.* 293, 308. 2 *Dall.* 305. 9 *Cranch*, 87.)

Any grant by a nation or State of land not owned by it is void. (5 *Wheat.* 308, and cases above cited. 12 *Wheat.* 523, 527—529, 534, 535, 544.)

#### CONSTRUCTION OF STATE GRANTS.

In *Howard vs. Ingersoll*, (13 *How.* 381, 411—418,) it was decided that, where the State of Georgia made a cession to the United States of land and jurisdiction of territory west of the Chattahooche River and along the western bank thereof, the bed of the river remained to Georgia, and that the boundary line ran along the top of the high western bank, leaving the bed of the river and the western shelving shore within the jurisdiction of Georgia.

In *Kingman vs. Sparrow*, (12 *Barb. R.* 202, 206,) the Supreme Court of New-York held, that a grant by the State, bounded on Niagara River and along the same, is limited by the margin of the river.

In the case of the Commissioners of the Canal Fund *vs.* Kempshall, (26 *Wend.* 404,) the Court of Errors of New-York decided, that a grant of land fronting on the Genesee River at Rochester, passed the title to the centre of Genesee River, and that the State was bound to pay damages for the diversion and obstruction of its waters to the injury of the riparian owner.

The same court re-affirmed this doctrine in *Child vs. Starr*, (4 *Hill*, 369, 372,) and the court held, that where a grant was bounded on a creek or innavigable river, it carried the soil and fisheries to the centre, unless a different intention was shown by the instrument or grant. (Chancellor Walworth cited and relied on 26 *Wend.* 404. 15 *Johns.* 454. 6 *Conn.* 471, 474. 3 *Kent's Com.* 432, 434. 4 *Mason's R.* 349. 6 *Mass. R.* 435. 17 *Ib.* 298. 5 *Wend.* 543. 4 *Burr.* 2164. 6 *Cow.* 376.)

In Pennsylvania the Supreme Court of that State decided, that a grant of land bounded by navigable waters extended only to low-water mark. (7 *Penn. St. R.* 201. 2 *Binney's R.* 476. To same effect, see 6 *Humphrey's Tenn. R.* 366—368.)

Each State has adopted portions of the common and civil law as to grants, their construction and effect, and has, by its policy or statutes, modified it to suit its circumstances. These various and varying laws govern all State grants and deeds of realty within our States, subject to constitutional limitations.

All grants by our republic, or by any State, are to be construed strictly, and they are not to be extended by construction. (8 *How.* 581. 4 *Mass. R.* 523, 524, 528.)

Pre-emption is a right in the public domain by public policy, and is a substantial right, subject to conditions of payment of the price of settlement and cultivation, and when these are performed, the title becomes perfect. If the pre-emptor is prevented from performing these conditions by a public officer, and he has done all in his power to comply with them, the law will protect him. (9 *How. R.* 314, 333.)

#### PUBLIC DOMAIN AND NAVIGABLE WATERS.

By our settled American law—

1. The shores of navigable waters, and the soil under

them, were not granted by the Constitution to the United States, but were reserved to the States respectively.

2. The new States have the same rights, sovereignty and jurisdiction over this subject as the original States.

3. That grants of land bounded on such navigable waters generally reach only to high-water mark.

4. That upon the formation of a new State it acquires no jurisdiction over or title to the national, public domain, except that the State may take by eminent domain, for municipal objects, so much thereof as may be needful, paying for the same, excluding, however, all military positions and other property devoted to specific national objects, as dock-yards, custom-houses, arsenals and the like. Over these the State has no such right.

5. That, though the States may own the soil under navigable waters below ordinary high-water mark, such waters shall forever remain public highways, and free to all the citizens of the United States, without tax, impost or substantial obstruction imposed by any State.

6. That the navigable waters within each State have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same.

7. That the term navigable waters reach the line of ordinary high-water mark. That Congress has no right, beyond such high-water mark, to grant the soil under water, as that is a part of the constitutional municipal property of an existing or future State.

8. That Congress can grant no exclusive right or control over any naturally navigable waters, as the Constitution of the United States vests a common and equal right of navigation in all the citizens of the United States. (16 *Pet.* 252, 253. 3 *How.* 230. 13 *Ib.* 519.)

## DEDICATION.

SEC. 15. A valid dedication of land for a public use may be made by the legal or equitable owner of it by parol, by acts, by deed, by writing or by making a map of a plat of ground and laying down on it streets, alleys or places for parks, levees, markets, burying places or public buildings, and selling lots, referring to such map. And no trustee or grantee is necessary to give it effect. (6 *Pet.* 431, 498. 10 *Ib.* 662. 11 *Barb. R.* 462. 18 *Ohio R.* 18, 94. 9 *B. Monroe's R.* 200. 19 *Conn. R.* 265, 266, 268. 11 *Penn. St. R.* 444, 446. 2 *Pet.* 256. 3 *Cushing's Mass. R.* 290. 4 *Ib.* 332. 1 *How. Miss. R.* 379. 19 *Wend.* 128. 4 *Paige's Ch. R.* 510. 6 *Hill's N. Y. R.* 407, 411.)

In many cases of dedication the original naked title remains in the dedicator, subject to the uses and trusts of the dedication, and in cases of misapplication of the property by the *cestui que trusts*, or of intrusion by the donor or others, the remedy of a party in interest is by applying to a court of equity to compel a use of the property according to the dedication. (6 *Pet.* 431. 9 *B. Mon. R.* 201. 4 *Paige's Ch. R.* 510, 515. 5 *Ham.* 298. 7 *Ib.* 217. 6 *Hill's N. Y. R.* 407. 16 *Pick. R.* 525.)

If a street be dedicated, and afterwards a municipal corporation orders it opened to the public, the owner is entitled only to nominal damages. (19 *Wend.* 128.)

Where streets, alleys or places for some public use are laid down on a map, and lots sold in reference to the map, the holders of any of the lots in the tract of land so mapped, become owners of a right to the free and unobstructed use of the streets and alleys laid down on the map, whether they are then actually opened or not, and to have all the dedications declared by the map or other-



wise carried out. (4 *Paige*, 510. 4 *Cush. R.* 332. 19 *Wend.* 128. 1 *Sumner*, 21. 2 *Hilliard's Real Prop.* 74. 16 *Pick. Mass. R.* 512, 520, 522, 524.)

But to enable a municipal corporation to control such dedicated streets and alleys, regular proceedings must be adopted to open them for public use. (2 *Selden's Ap. R.* 257.)

Any person owning such franchise, or the dedicator or his heirs, may enforce the use of dedicated property, in equity, agreeable to the dedication. (See above cases.)

The use of dedicated property is evidence of an acceptance of the donation. (*Ib.*) The period of such is not material. (19 *Conn. R.* 268. 6 *Hill's N. Y. R.* 413, 414.)

#### DIVESTMENT OF PUBLIC RIGHTS.

SEC. 16. Dedicated property may be abandoned for every public purpose, and then the full title of the dedicator ought, it would seem, to revest in him, his heirs or assigns. A renunciation by the parties interested in it ought to cancel a dedication. (*Harringt. Mich. Ch. R.* 404. 6 *Hill*, 414. 19 *Wend.* 659. 1 *Sumner*, 21. 2 *Hilliard's Real Prop.* 74.)

Where property has been taken by eminent domain for a public object, and the fee paid for it applied to another public or *quasi* public purpose, pursuant to a statute so directing, the title does not on that account revest in the original owner, nor is he entitled to a new compensation for the land already paid for. (4 *Cush. R.* 152. 9 *Barb.* 350. 5 *Paige's Ch. R.* 137.)

If property be taken in fee by eminent domain for an almshouse, penitentiary or other public edifice, and paid for, an absolute title vests, and upon a subsequent abandonment of it for such purpose, the title does not revest, but the State or municipal corporation owning it may sell it (2 *Selden's R.* 214. 8 *Barb.* 486.)

If land is so taken in fee and paid for, for a canal, railway or road, and it be abandoned, the title reverts in the owner in certain cases, as the taking was for such special object. (11 *Barb.* 26. *Ch.* 3, § 12.)

The same principle seems to apply to land and water rights taken for public mills, ferries and other similar purposes. If such public object is abandoned, and the premises are not devoted by law to some new public use, they revert, it seems, to the original owner. (*Ib.*)

Where such dedication or taking by eminent domain of property for a public use has occurred, and the property is subsequently applied to a private use, to the injury of any party, a court of equity will enjoin against such misappropriation of it. (5 *Paige*, 137, § 15. 6 *Ham.* 298. 7 *Ib.* 217.)

In such cases, if the property is wrongfully applied by consent of the party complaining, or if prescription or the statute of limitations has perfected the right of such use or abuse by lapse of time, the title thereto becomes complete. If not, any party in interest has his remedy. (1 *Sum. R.* 21, and cases above cited.)

In *Adams vs. Saratoga and W. R. R. Co.*, (11 *Barb. R.* 449, 450,) it was decided by the Supreme Court of New-York, the accurate and sound jurist, John Willard, presiding justice, giving the opinion, that the laying out a piece of land as part of a village plat, and selling lots adjacent to a street thereon, is a dedication of such street for that object, and that it was not competent for the party making it to re-assert any right over the land, as long as it remained in public use; that the temporary occupation of part of such street to construct a rail-road tunnel under such street, and its obstruction for that purpose, provided it was afterward left free and open for use as a street, pursuant to the rail-road charter, was legal. And that, though individuals residing on such street, during the

construction of the tunnel, might suffer a temporary inconvenience, in the absence of negligence and unskillfulness, the rail-road company was not liable to damages, and that it was a case of *damnum absque injuria*. And that the dedicator or his heirs could not revoke the dedication for this cause, and that neither of them can recover back the dedicated property in ejectment unless they should prove that the whole purpose has ceased for which the dedication was made, and that the ultimate fee remains in the party claiming. (pp. 451, 454.)

In *Clements vs. West Troy*, (16 *Barb.* 203,) Mr. Justice Harris decided, that where a person makes a map of land, laying down on it lots, streets or alleys, that thereby the owners of such lots and the proprietors have a right of way over such streets and alleys, and might institute proceedings to free them from obstructions; but that a city or village corporation cannot avail itself of such dedication until it accepts it, by instituting the proceedings which the law has prescribed for laying out highways, streets or alleys.

The Supreme Court of the United States, (9 *How. U. S. R.* 30, 31, and cases there cited,) show, that a dedication of land to a public use, to be effectual, must indicate an abandonment of the use exclusively to the community by the owner of the soil; that such dedication to public use must rest on a clear assent of the owner, made by deed or by unsealed writing, expressing such assent, or, as no fee in the land, but only an easement generally is given, it may be by parol or by acts inconsistent and irreconcilable with any construction except such consent. (See 11 *East*, 370. 3 *J. R.* 265. 3 *Bing.* 447. 22 *Pick.* 75. 7 *Leigh.* 546, 665. 8 *Adol. & Ellis*, 99. 1 *Hill*, 189, 191. 6 *Pet.* 431, 437. 19 *Wend.* 128. 10 *Pet.* 712, 718. 2 *Ib.* 508. 3 *Kent's Com.* 428, 450. 7 *Johns.* 106. 12 *Wheat.* 582. 9 *Cranch*, 331. 4 *Paige*, 510. 12 *Wend.*

172. 19 *Pick.* 406. 7 *How. U. S. R.* 196. 2 *Selden's N. Y. R.* 263, 264.)

Where an owner surveys and maps his own land, dedicating streets and squares to the public, this does not impose on the public authorities the duty of improving and keeping the same in repair, until they shall duly accept such dedication. (2 *Selden's R.* 263, 264.) That, if land in a city or village is dedicated upon condition of certain improvements thereon by the corporation, and the same is accepted, and the condition is not performed, an action for damages will lie, or a bill in equity may be filed to compel the corporation to perform its contract and execute the public trust. (11 *Paige's Ch. R.* 414, 424—426.)

Where a man sells lots with certain limitations of use of the residue, for the benefit of the grantees, and covenants against nuisances and depreciating improvements, a court of equity will enforce such protective contracts, as among the grantees as well as against the grantor. (8 *Ib.* 351, 358, 359.)

#### ROMAN TITLES.

SEC. 17. Among the Orientals and Romans, according to the able and learned Niebuhr, the principle that the national sovereignty was the original owner of all realty, and that all private titles were derived from it, was generally adopted and acted on.

In the Roman commonwealth all territory was obtained by violence and war, and rarely, if ever, by purchase and free cession. As the Roman conquests extended, a portion of the conquered lands were seized as public domain, and prisoners of war, and sometimes non-combatant enemies subdued, were sold as slaves at Rome, and were generally purchased by the patricians and rich Romans. The Licinian law, and other agrarian laws regulating the use and

disposition of the domain, allowed the *possessio* or use for a small rent, and sometimes gave titles in fee to all Roman citizens, nominally, on terms of equality. But the oligarchy, in violation of the theory of the laws, secured to themselves a large share of the Roman domain, and held it without rent, which they cultivated by slaves, to the exclusion of the *plebs*, or common people. The oligarchs early made a law to sell a debtor and his children as slaves for debt. By this law, by usury and illegal appropriations of the public domain, by engrossing the high offices and a large share of the booty in wars, the Roman oligarchy became very rich in lands, slaves and personalty, and oppressors of the *plebs*, or common people, as well as the robbers and pillagers of foreign nations. The effect was a concentration of most of the national lands as well as of the small farms, and of all industrial occupations in the oligarchs and their slaves, and dependence, poverty and misery among laboring freemen. Licinius, the elder Cassius, the two Gracchi, tribunes of the people, Cæsar, the great Roman consul, statesman and general, and others, labored to enforce the agrarian laws with a view to secure the Roman *plebs* fee-simple farms out of the public domain, and thus save them from poverty and ruin. These noble statesmen were untruly charged by the oligarchs with aspiring to the imperial crown, and designing to divide the lands of the rich among the poor, and one was murdered under a judicial sentence, and the residue were assassinated by the consuls, the patricians and their retainers, to save, as they pretended, the sanctity of private property and the republic, so-called, from overthrow. Cæsar made a decree, in the plenitude of his power, that a certain portion of the labor of Italy should be performed by free Romans, for the purpose of securing to them a part of the profitable employments engrossed by slaves. This decree probably caused the patrician

conspiracy and his murder, as it had before done in the case of the Gracchi. Thus the Roman agrarian laws were overthrown, and the Roman oligarchs, war, slavery and violence destroyed the last remains of Roman virtue, liberty and security, erected the throne of the Cæsars, and prepared Rome for her decline and fall.

## FRANCHISES.

SEC. 18. Franchises, in kingly governments, are a part of the king's prerogative, and are esteemed royal privileges subsisting in the hands of a subject, and which can there only be obtained by grant from the crown, or by prescription, which presupposes a grant from the sovereign. (4 *Comyn's Dig.* Day's ed. 1824, p. 450, (A. 1,) n. a, b, c.) This species of prescription in England was applied only to things capable of perpetual duration. The words franchise and liberty are held synonymous, and mean governmental leave to use certain governmental powers and rights, for the purposes and in the manner prescribed by public authority. (*Ib.*) By the Code Napoleon prescription in favor of the nation exists, as well as in favor of private persons. (*Code Napoleon*, B. 3, c. 1, § 2227.)

In the United States all franchises are constitutionally a permanent part of the legislative power, are statutory creations, and are granted and regulated by special or general statutes, which affix to each its legal rights, duties and qualities, making it a legal being, such as the statute or statutes shall by express provisions prescribe. (13 *Peters' R.* 595. 23 *Wend.* 554. 8 *How. U. S. R.* 581. 10 *Ib.* 511, 534. 3 *Duer's R.* 127, 142. 11 *Pet.* 545. 8 *Ib.* 738. 9 *How. U. S. R.* 603. *Angell & Ames on Corp.* 3d ed. 3, 697. 15 *Johns. R.* 387. 1 *Ohio St. R. N. S. by McCook*, 685, 686. 11 *Wend.* 586. 5 *Johns. R.* 175.

176. 7 *Grattan's Virg. R.* 225—229. 1 *Blackf. Ind. R.* 405. 26 *Vermont R.* 721. 14 *Illinois R.* 867. 13 *Ib.* 28. 8 *Maine R.* 365. 3 *Missouri R.* 470. 15 *Pick. R.* 251, 252. 5 *Yerger's R.* 189. 10 *Ib.* 280. 17 *Conn. R.* 454. 1 *Bailey's S. Car. R.* 472. 1 *Greene's Iowa R.* 498. *Long's N. Car. Law R.* 69. 6 *Georgia R. by Cobb*, 142. 6 *Wheat.* 593.)

Banks, railways, bridges and ferries, granted and regulated by State legislatures, or Congress in the District of Columbia or in the national territories, are examples of franchises, and in construing their powers and rights, nothing is taken by the grantee or grantees by construction, but he or they are limited to the privileges expressly or by unavoidable implication granted by statute. (8 *How. U. S. R.* 581. 5 *Selden's R.* 452. 11 *Pet.* 545, 546. 8 *Ib.* 738.)

Hence, a legislature is not precluded from granting rival and competing banks, bridges, ferries or other franchises, though the value of the first or former like grants might thereby be rendered valueless. (*Ib.*)

In our republic, therefore, as well as in England, a franchise not declared by statute assignable, cannot be assigned, or agreed, or substantially put under the control of any but the grantee. (5 *Johns. R.* 175, 176. 1 *Blackf. Ind. R.* 405. 16 *N. Y. Ap. R.* 161—168, n. 6 *Eng. Law & Eq. R.* 106, 110. 12 *Ib.* 224, 228. 13 *Ib.* 506—516. 26 *Vermont R.* 721. 14 *Illinois R.* 86, 87. 12 *Barb.* 61—63. 22 *Eng. Law & Eq. R.* 198, 199. 3 *Comst. R.* 339, 342. 21 *Barb.* 221, 224. 3 *Comst. N. Y. Ap. R.* 242. 5 *Law Reporter*, 107, 108. 82 *Eng. Com. L. R.* 396, 397.)

A grant of a franchise raises a promise, by implication of law, on the part of the grantee, to perform its duties. (16 *N. Y. Ap. R.* 162—165, 168, and notes.)

If franchises are granted on conditions, they must be



complied with, or the government may, by a proceeding in the nature of a *quo warranto*, oust the grantee of his privileges. (23 *Wend.* 537, 544, 550. *N. Y. Code*, §§ 432—441.) And where a bridge or railway is not constructed on the route or in the manner allowed by law, it may be indicted by the attorney-general and abated. (16 *N. Y. Ap. R.* 162. 3 *Gray's Mass. R.* 347, 353.)

The legislature may regulate the use of all franchises in its discretion, subject to constitutional limitations, as they are a part of the sovereign power, and as such may be controlled and regulated by the law-making power. (10 *How. U. S. R.* 534.)

A grantee of a franchise, as of a rail-road, ferry, &c., for a term of years, has a duty for the term, and he can free himself from it only by a surrender of it to the government, and by its acceptance or by a judicial dissolution.

SEC. 19. Hence no title to such powers can be established by use, prescription or usurpation. (*Ib.* and 10 *How. U. S. R.* 534. 18 *Johns. R.* 229. 4 *Mass. R.* 522.)

In *Auburn and Cato Plank-Road Co. vs. Douglass*, (5 *Selden's N. Y. R.* 452, 453,) the Court of Appeals of New-York held, that, unless a land proprietor had a right to restrict the use which the proprietor of such adjoining tenement should make of his property, no action would lie for acts done by such proprietor upon his own land, however great the damage caused thereby, and whatever his motive might be in such use. (5 *Ib.* 449, 450.) The court also held (p. 451) that the extent of the plaintiffs' franchise was to be determined by the terms of their charter, and the only right of the plank-road company to make a road, take tolls and erect a toll-gate must be expressly granted in the charter; and as the charter gave no right to restrict the proprietors in the use of their land, that the defendant had a right to make a road on his own land, parallel to the plank-road where the toll-



gate was placed, which was used by defendant and others. They held, that the plaintiffs took by implication no right to prevent such parallel road, though to the great injury of plaintiffs.

The court held, (pp. 452, 453,) that Chancellor Kent's doctrine on this subject was overthrown by the Warren Bridge case, (11 *Pet.* 429,) and by other authorities.

The court held, as a general principle, that a corporation is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power, and that, *a fortiori*, it cannot be permitted to encroach by implication upon the rights of individuals, who are in no respect parties to the compact between the legislature and such corporation.

The law is settled in this country that no franchise can be taken from the government by usurpation or prescription, but only by legislative grant, and that in construing the grant it is taken most strongly against the grantee or licensee, and that all doubts are to be taken most favorably to the government, as it is the legal trustee of the people, and the same rule prevails whether the State or private persons are the contestants. (8 *How. U. S. R.* 581. 5 *Selden's R.* 451—453. Plank-Road case and above cases.)

In *Mechanics' Bank vs. New-York and New-Haven R. R. Co.*, (3 *Kernan's R.* 599, 620, 624,) the Court of Appeals of New-York decided, that a corporation of a fixed capital, divided into a certain number of shares, has no power to issue certificates beyond the legal number, or to increase its capital, and that all certificates of stock signed and issued by the transfer officer of the company, beyond the actual capital, and not really representing a part of it actually owned by the person named in such certificate, are illegal and void. That such over-certificates are void in the hands of the party named therein, or of his as-

signee, as the transfer officer as well as the corporation, had no power to add to the capital or to issue such over-certificates, and that in consequence of such defect of authority, the corporation is not liable for damages for the wrongful issuing of such over certificates; and that the takers of such certificates are bound to see that they represent real shares of stock, as between them and the corporation. The court also held, that a corporation might be sued for refusing to allow a transfer on their books of real shares of stock, and that a vendee might acquire, by assignment, a right in equity to stock, though by its by-laws all transfers must be on the transfer-book of the corporation.

Where franchise is conferred, the express powers granted, and those necessarily incidental, alone pass to the licensee or grantee; and hence a grant of a franchise to a person without express words authorizing assignment or perpetuity, as heirs or assigns, is personal, and a legislative grant of a railway or other franchise will not authorize a lease or transfer of it by the grantee, unless the legislature shall so expressly enact, and all contracts of lease, not so authorized, are illegal. (5 *Law Reporter*, 106—108. 3 *Comst. R.* 242. 6 *Eng. L. & Eq.* 106, 110. 12 *Ib.* 224. 13 *Ib.* 506. 21 *Barb.* 224. 8 *How. U. S. R.* 581. 5 *Johns. R.* 175. 13 *Pet. R.* 587, 595. 14 *Illinois R.* 85. 22 *Wend.* 554. 3 *Duer's R.* 120, 127, 142. 1 *Comst. R.* 318. 26 *Vermont R.* 721. 27 *Penn. St. R.* (3 *Casey*,) 351.)

## AMERICAN FRANCHISES.

In *Lew vs. Gainsville*, (7 *Ala. R. N. S.* 87,) the Supreme Court of Alabama held, that there were franchises for ferries which were deemed in England, by the common law, hereditaments, which were capable of alienation and of descent. But the court say, that in Alabama “the whole

matter has been regulated by statute; so that we must, therefore, look thereto to ascertain what rights appertain to the grantee of a ferry."

In *Somerville vs. Wimbish*, (7 *Grattan*, 225, 229,) the Court of Appeals of Virginia held, that in Virginia, a ferry franchise in that State was the creature of statute law.

In *Fay, Petitioner*, (15 *Pick. Mass. R.* 249,) the Supreme Court of Massachusetts say, that the king's license was necessary to set up a ferry in England, but add, "In this commonwealth it is regulated by statute."

In *Robins vs. Embry and others*, (1 *Smedes & Marsh. Ch. Miss. R.* 207, 255, 265,) the Supreme Court of Chancery of Mississippi held, that in that State a corporation was the creature of legislative will, and had no such general powers or rights of property as belong to a private citizen. In this case it was held, that a banking and railroad franchise was not assignable, though its real and personal property might be, unless specially authorized by the charter.

In *St. Peter's Church case*, (3 *Comst.* 242,) the Court of Appeals of New-York held, that a general assignment passed the corporate property, but not the franchise.

The Supreme Court of the Union have held, that a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law, and possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence, and that all franchises in our republic are created by general or special statutes, and that in construing the powers so granted by statute, the grantee or corporation take nothing by implication, and can exercise no privilege unless it is expressly granted. (4 *Wheat.* 636. 13 *Pet.* 587. 11 *Ib.* 545. 8 *How.* 581. 21 *Ib.* 442. 16 *Ib.* 524. 9 *Ib.* 172, 184. 10 *Ib.* 511, 534. 18 *Ib.* 74.)

In construing all statutes of States or acts of Congress,

general and special, granting franchises of fisheries, wharves, piers, &c., in navigable waters, or to persons or corporations, banking, insurance, gas, manufacturing or other legislative powers known to our law as franchises, nothing is taken by implication by the grantees or corporations. (*Ib.*) In our Union, all franchises being emanations from and a constitutional part of the legislative power, are subject to the above principles, and within the permanent control of the legislature for the public good. As a logical consequence, no franchise can be mortgaged, assigned or seized on execution, as it is not property. (*Ib.* 8 *How.* 581. 21 *Ib.* 442. 3 *Comst. N. Y. R.* 242. 5 *Law R.* 106.)

The distinction between British franchises and our own is as marked as the character of the two governments.

In England, the king originally aggregated all the executive, judicial and legislative power of the realm; hence he assumed that all things were subject to royal control. It appears there were three sorts of franchises:

1. Those where a royal charter must be presented to establish it.

2. Where a grant might be presumed and prescribed for, as a park, chase, warren, &c.

3. Parliamentary grants for canals, railways, turnpikes, banks, gas companies, &c.

The latter alone have any analogy to our franchises, but our franchises differ from theirs, as they are emanations from and a constitutional part of legislative power. (*Ib.* 10 *How.* 511. 21 *Ib.* 442. 18 *Johns. R.* 229.)

A corporation or the grantee of a franchise is bound by law to perform its legal duties in favor of the State and the public. The Court of Errors and Court of Appeals of New-York and the House of Lords in England have so held. (16 *N. Y. Ap. R.* 161, 168, and notes. 5 *Selden*, 452. 23 *Wend.* 554.)

## ALLUVION—ISLANDS—RELICION.

SEC. 20. In case lakes, rivers or streams form the boundary between nations or States of our Union, all the islands and land on either side of it, including islands newly formed, and all gradual alluvions to the territory of each, belong to it. If a State of our Union borders a great lake or the ocean, and they gradually recede, the property of the adjacent proprietor advances to ordinary high-water mark, and beyond, to the extent of a marine league, the nation or State would own the soil.

As all riparian owners have common and equal rights in adjacent waters, as a general rule each must so enjoy his right so as not to destroy or impair those of others. (*Inst. Justinian*, lib. 2, tit. 2, §§ 20—22. 3 *Mass. R.* 352. 10 *Pet.* 717. *Code Nap.* b. 2, tit. 2, §§ 556, 557, 559, 560, 562, 563. 5 *Paige Ch. R.* 158.)

In case of a rapid change in the lake, river or sea-coast, it would not affect the titles of the States or persons owning the opposite sides of the original line, nor does a temporary branch of a navigable river, created by high water and enclosing a part of adjacent land for a time, change the boundary of a State, which is by compact ordinary low-water mark. (*Ib.* and 5 *Wheat.* 374.)

## PUBLIC NUISANCES.

SEC. 21. Any obstruction to the free use by the public of highways, of streets, of public grounds, of navigable waters, rivers, bays and lakes, where a right of navigation belongs to the community at large, is a public nuisance, unless the same is erected by the authority of the legislature; and the ordinary proceeding at law is by indictment or information, by which the nuisance may be

abated ; and the person who caused it may be punished. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage ; because, to that extent, he has suffered beyond his portion of the injury, in common with the community at large. (17 *Conn. R.* 372.)

Besides this remedy at law, a court of equity may take jurisdiction in cases of public nuisance by an information filed by the attorney-general, and that court may, by injunction, in cases of great public concern, prevent their erection or perpetually enjoin against their continuance. This may also be done to prevent intrusion upon the soil under navigable waters, or between high and low-water mark, upon State canals, public lands, works and edifices. (12 *Pet.* 91, 97, 98. 9 *How. U. S. R.* 10, 27—29, and cases there cited. 21 *Barb.* 617, 627—629. 6 *Paige's Ch. R.* 83—133. 6 *Johns. Ch. R.* 439. 2 *Selden's R.* 522. *Eden on Inj.* 1st Am. ed. 57, 58. 2 *Story's Eq. Com.* §§ 205—208, 924, 925, 927. 13 *How.* 519. 7 *Cushing's R.* 53, 101. 2 *Wils. Ch. R.* 101.)

In enforcing this jurisdiction the court will employ a temporary or perpetual injunction, when and so far as necessary to prevent great or irremediable injury to the public. (*Ib.*)

#### OFFICES AND PUBLIC EMPLOYMENTS.

SEC. 22. Offices and public employments are, in our republic, governmental means of executing the constitutional powers lodged in the various departments, and not a property or incorporeal hereditament in the officeholder. All offices, from the highest to the lowest, are personal trusts, and incapable of being deputed, unless the Constitution or laws shall so expressly provide ; and every contract to control appointments to such trusts, or to

share their profits or to depute them, is illegal and void. (4 *Comst. R.* 455, 456. 9 *Wend.* 177. 2 *Hill's R.* 196—200, 434. 1 *Story's Eq. Jur.* §§ 295, 296. 1 *Selden's N. Y. R.* 224, 285, 295. *Maverick Ferry Steamer case*, 5 *Law Reporter*, 108, 109, 114. *Dunlap's Paley on Agency*, ed. 1856, pp. 175, 176, and n. a. 18 *Barb.* 513. 5 *Johns. R.* 175, 176. 1 *Blackf. Ind. R.* 405. 1 *Greene's Iowa R.* 502. 8 *How. U. S. R.* 581. *Chitty on Bills*, Am. ed. 1849, pp. 82—84. 15 *Wend.* 416. 26 *Ib.* 485. 4 *Pet.* 184. 20 *Wend.* 24, 390. 7 *Mass. R.* 118. 3 *Merivale's R.* 468, 470. 2 *Wils. R.* 133. *Blackst. R.* 322.)

All such illegal contracts are void as to the public and third persons, as well as between the parties. (*Ib.* 7 *Mass. R.* 118. 3 *Day's R.* 145. 4 *Comst. R.* 455, 456. 5 *Selden*, 452, 453. 19 *N. Y. Ap. R.* 161, n.)

The privity and efficiency of all governments depend on these principles. Hence, every contract to derange, defeat, change or corrupt the action of any department of the government, or to affect its offices or its action, are illegal and void between the parties, and as to third persons and the public. In Waterman's edition, of 1856, of *Dunlap's Paley on Agency*, pp. 175, 176 and note a, this doctrine is well laid down. It is there affirmed that no delegated authority can be executed except by the person to whom it is given; for the confidence being personal, cannot be assigned to a stranger. A power to sell any thing, therefore, being personal, cannot be deputed without the consent of the principal. Verplanck, Senator, quoted in the note, laid down this doctrine in *Lyon vs. Jerome*, in the New-York Court of Errors, (26 *Wend.* 485.) He says, that the reason and policy of the rule apply to the delegation of authority by the State to its high public officers, and that they cannot delegate their powers, and so the court held.

These principles apply to all persons holding any public employment or office. They are personal trusts con-



fided to them for their personal fitness. (See, also, 3 *Kernan's R.* 591.)

It is upon the same principle that franchises granted to corporations or persons cannot be assigned unless a statute shall so expressly declare, for the reason that they are governmental trusts—public privileges granted and regulated by the legislature for the public convenience and advantage.

SEC. 23. If letters patent are obtained by fraud from a State or the national government, a bill in equity lies by the sovereignty defrauded to set them aside and annul them, as fraud vitiates every transaction. (19 *How.* 324.)

#### ESCHEATS AND DERELICTS.

SEC. 24. By virtue of sovereignty, each State of our Union is deemed the original owner of all realty and immovables within its territory, and hence, in default of any legal heir capable of taking the same by the *lex loci rei sitæ*, the property escheats to the State as ultimate sovereign proprietor. This doctrine seems to be true in all the territories of the United States, and escheats go to the national government. It is a general rule of nations.

. Each State becomes also owner of derelict property within its territory by virtue of sovereignty, as we have explained. The national government must have the same power in the territories, as in these it possesses the power of a State and of the general government united. In the first and fifth chapters the distinction between the general and State governments, in this respect, has been treated of.

Nations generally possess these powers as part of their sovereignty, and own all property to which no person can make title under the law of the place.



SEC. 25. Human life is property, and the relatives of any individual, as well as the nation to which the person belongs, have a right in his or her life. By the Roman and civil law, and by the Saxon law, those who wrongfully or negligently destroyed a human being were held liable before the municipal tribunals to pay damages to the surviving relatives of the deceased. In England, after the Norman conquest, this law was not enforced by the king's courts, and fell into disuse. The old law remained in Scotland and many countries, and England has, by statute, restored the old law, and she has been followed by many States of our Union, and all will, no doubt, soon adopt this old and just legal rule.

France, Great Britain, the United States and other civilized nations have, of late, asserted the above doctrines, and acknowledged and enforced them. Our republic applied them to the Panama massacre, and to the killing of an American sailor on board the *Water Witch* by a shot from a Paraguay fort, and to the case of an American killed by a French policeman. Satisfaction was made by France and Paraguay to the families of the deceased.

SEC. 26. It is a benign and just principle. All the rights of all the citizens of a State or nation belong to it in reference to all other governments. And there is no distinction between native and naturalized citizens. As to the latter, after a legal naturalization in a foreign country, all their duties and obligations to their native countries cease, and can only be revived by a regular naturalization in their native countries.

Aliens in a foreign country, within its territory and curtilage, are entitled to its protection, and they are so while on board its ships on the high seas. In these cases aliens are, for the time being, subject to the laws of the foreign nation and entitled to its protection; for the

sovereignty of a country covers its territory with its curtilage, and its ships on the high seas, and no other country or its armed ships have any right of entry on or jurisdiction in the ships or territory of a foreign nation.

If a foreigner be forcibly abducted, as a Cuban was from New-Orleans by the Spanish consul, and sent to Cuba, it is the duty of the injured State to compel his restoration and satisfaction, as President Taylor did in the Cuban case.

SEC. 27. A State has a right to file a bill in chancery to maintain its right to the free navigation of a nationally navigable river, and prevent its illegal obstruction. (Wheeling Bridge case, ch. 5.)

## CHAPTER VII.

### RIGHTS OF PERSONS.

SEC. 1. A nation's guardianship and protection of its citizens and their property covers and shields them from wrong on the high seas and in all foreign countries. Hence, the rights of the citizens of a nation out of their own country form a part of the law of nations. (*Vattel*, B. 2, c. 8, §§ 107—109; c. 7, § 8. 2 *Cranch*, 64. Hence that law holds, for the purpose of ascertaining the rights of the citizens of one country in controversies with those of another, that they are respectively parties to the public acts of their respective nations or States. (17 *Johns. R.* 522.)

### RELIGION.

SEC. 2. The first elementary, inherent and inalienable right of all mankind is to worship God freely at home and abroad, in foreign States, on the sublime ocean and on the broad deserts of the earth. Such peaceful right of worship, without disturbing others, is the right of every man, and cannot be interfered with by any government without violating the precepts of the gospel and the liberties of men. The Holy Alliance, formed by the Emperors of Austria, Russia and the King of Prussia, and afterwards assented to by the King of France, the Pope and most European sovereigns, declared the gospel to be the true rule of international and municipal law of their empires and of all nations.

This doctrine is consecrated as a great principle of public law by our Constitution of the United States, in these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (*Const. U. S.* art. 1.)

All aliens in foreign lands are entitled to freedom of religious worship, and the incidental one of receiving, circulating and using the Bible, in any language, and any other religious books, as well as that of having churches, burial places, and enjoying freely their own modes of sepulture, unimpeded by the local government.

All civilized Christian nations of Europe and America admit that the Bible is God's revelation and law given to man, and that it is alike obligatory upon nations, princes and private persons. Jesus Christ commanded his disciples and apostles to preach and teach his gospel to every creature, and its universal prevalence among all nations, and its eradication of all pagan and anti-christian systems is clearly predicted.

For about two centuries the great and good men of Europe and America have concurred in these principles, though European practice generally does not correspond with them. The Protector, Cromwell, his secretary, Milton, and De Witt, the Grand Pensioner of Holland, two great statesmen and patriots, strongly supported religious liberty. De Witt, in his *Political Maxims*, defends the rights of aliens in Holland to entire religious freedom. These great executive officers of England and Holland confer honor on their age by their genius, their integrity, their humanity and their valor by their defence of liberty of worship. The clouds and mists of calumny, which have obscured the characters of these distinguished men, are passing away, and they will forever be held noble statesmen, pure patriots and benefactors of their race.

Henry IV. sought to protect Protestants from per-

secution, but Napoleon first established the principle of freedom of religion in France, and thus set aside the detestable precedents of Louis XIV. and of Charles IX. To a deputation of Protestants, he declared his "firm determination and will to maintain religious liberty in its fullest extent." It is just to Napoleon to say, that he was always a friend of religious freedom.

This principle of public law, having the sanction of God, of all noble statesmen and of our republic, every sovereign is bound to support freedom of worship. Every nation has the right of enforcing, by the *ultima ratio*, if all gentle means fail, these important pacific, natural, inherent rights of their citizens in foreign countries.

#### JUDICIAL PROTECTION OF FOREIGNERS.

SEC. 3. In all foreign countries foreigners are entitled to complete protection of person and property; and the tribunals ought to administer justice to citizens and foreigners with an even hand, and without discrimination. The laws of a country ought to prescribe a common rule of right for the protection of all foreigners and citizens. (*Vattel*, B. 2, c. 8, §§ 100, 107, 108, 111. 2 *Wood. & Minot's R.* 15.) Judge Woodbury, in the last cited case, lays down this doctrine with much ability, and cites conclusive authorities.

It is plain that every nation has a right to demand from other nations a humane administration of justice, agreeable to national equity. In *Taylor vs. Carpenter*, (2 *Wood. & Minot's R.* 1, 9, 10,) it was held by the Circuit Court of the United States for Massachusetts, that foreigners, residing out of our republic, might sue in that court for imitating the trade-marks of plaintiffs, and the court held that an alien friend could bring personal actions for wrongs done them for injuries that would, as between citizens,

give ground of action. Judge Woodbury well said, that a person from abroad suing in this country, is entitled to enjoy no greater nor less rights than citizens.

The Spanish government, in Cuba, violated the rights of Mr. Thrasher, of New-Orleans, an American, temporarily living as a domiciled alien in Cuba, and of those American citizens who entered the Queen of the Antilles by the invitation of the Cubans, and led by a Cuban general, to liberate the island from her oppressors, in a revolutionary war of independence. In these cases civil and military tribunals condemned without fair trial.

#### NATIONAL COMMERCE AND INTERCOURSE.

SEC. 4. A nation may regulate the admission of persons and property into its territory, and impose such duties on importations from foreign countries as its legislative powers shall prescribe, subject to a right of free passage across an isthmus. But at this day no nation can refuse commerce and intercourse with other nations.

When, however, foreigners enter a country, an equal, just and complete protection of persons and property should be extended to them. In importations of merchandise, a distinction and discrimination has been practised by nations in favor of their own citizens. But our republic has long contended for equality, and the disuse of this impolitic and anti-commercial practice; and Great Britain and the United States have established, in some degree, the rule of reciprocity and free trade, and other maritime nations are adopting it.

The coasting trade may be reserved to a country or its citizens, while foreign trade and that of colonies should be on the basis of commercial freedom; and free intercourse of mankind begins to be understood to be the common interest and common duty of nations.

Each nation designates its ports of entry, and they become the sole marts of foreign commerce.

Every nation is entitled to all rights of free commerce stipulated in treaties with foreign governments, and to national comity.

Treaties of commerce stipulate generally for trade and intercourse between their respective citizens or subjects, and other incidental matters. What is the effect of such general stipulation? It is a settled rule in the interpretation of treaties, that it is the same as other contracts. In order to understand the true meaning of a treaty, the parties to it are to be considered as well as the subject-matter of it. If the ruling and governing race of the contracting nations are of the Caucasian family, Indians or colored persons would not seem to be necessarily included in the term "citizen" or "subject," if not so expressly declared by the treaty. If one party was of the Indian or African family, a contrary construction would prevail, as such would be the obvious intent of the contract.

In treaties of commerce between Caucasian nations, the parties contract by such general clause, that there shall be a general freedom of ingress and egress by land and water, of trade and intercourse to and from the ports of each nation in all articles not prohibited, subject to legal duties, unless otherwise stipulated. Though nothing is said of exceptions, by custom, it seems to be established, that any nation may, as a necessary police regulation, refuse to allow foreign criminals, paupers, or persons having infectious diseases, or colored persons from abroad, from entering their ports. (14 *How.* 13.) On a question arising in South Carolina, it has been so adjudicated by the State court.

Under such a treaty of commerce, the plain meaning entitles all persons of the contracting nations, within the

terms "citizens" or "subjects," to such freedom of trade and intercourse, and nothing written, published, said or done by any such citizen or subject in his own country, and in accordance with its laws, can be made a ground of exclusion from the country of the other party to the treaty, or of police surveillance therein. Nor has any such contracting nation a right to impede or prevent any lawful intercourse of the citizens of the other party with the people of the former country, or to refuse to admit into port and trade a vessel of the other party, on account of any offence committed abroad against the former by any individual on board, for that would violate the spirit of such treaty. Much less can such a nation refuse its ports to a foreign vessel entitled to free trade, on account of a suspicion of unfriendliness of any individual on board.

As nations possess no extra-territorial jurisdiction, they have no right to seek to enforce a censorship of a foreign press, or to regulate freedom of speech or of lawful action abroad, or to notice them officially by its police or judicial action ; and any refusal to admit a vessel to land and trade, founded on such foreign transaction, would be a violation of a treaty of commerce. (*Secretary Webster to Mr. Hulseman, 5 Stryker's A. M. Reg. 527, 536.*)

In absence of a treaty of commerce, national comity substantially enforces the same international duties on the ground of the consent of each nation, now grown into a common law of Christian nations. (6 *Webster's W.* 610, 611.)

Such treaty of commerce substantially forbids any expensive or vexatious preliminaries to landing or enjoying domicil there for a lawful purpose, by the citizens or subjects of either contracting nation. The imposition of oaths upon such friendly aliens, inconsistently with their allegiance to their own country, the violation of their correspondence with their country, by breaking seals, detention or otherwise, the stoppage of newspapers addressed



to them from home, and all like despotic proceedings. Such acts are unfriendly, wrongful, fatally injurious to commercial prosperity, and are violations of the comity of nations as well as of the spirit of commercial treaties. (*Ib.*)

SEC. 5. No nation has a moral right of seclusion. Commerce and intercourse have been made by the Creator necessary to the prosperity of nations. Hence, by the law of nature and of nations, all nations must observe this duty, and contribute their part for the advancement of the common happiness of mankind. China long violated this duty; and though her exclusion of opium from India was lawful as a municipal law, which no foreign country had a right to interfere with, her wrongful seclusion urged Great Britain, as well as her interest in the opium trade, to force open the ports of the Celestial Empire. This led to the successful war of France and Great Britain in China. Japan was culpable in this respect; but her intelligent people have wisely abandoned their seclusion, and will soon engage in the world's commerce.

In 1854 a letter of our American President to the Emperor of Japan, borne by Commodore Perry, accompanied by a small fleet to give respect to his negotiations, unsealed that long-closed, but rich and powerful nation, and a treaty was made between Japan and the United States. Suitable presents to the Emperor and Empress, and especially Morse's telegraph, and a rail-road track with locomotive and cars, put in operation by American operators, happily paved the way for the treaty of commerce. This is a noble, pacific triumph of our own country, and honorable alike to the Japanese government and to our own.

#### NATIONAL HOSPITALITY AND ASYLUM.

SEC. 6. All nations are bound by the golden rule and the law of nature to observe hospitality and humanity

towards foreigners admitted to their country, or cast upon their shores, or forced into their territory. In case of pestilence or famine of one nation, others, according to their ability, are bound to succor the suffering people.

This has been done by the American people to sufferers of Carracas, of Ireland and Greece.

American contributions in 1852 to the sufferers by fire at Montreal were in a proper spirit of beneficence.

Our treaties often stipulate aid to shipwrecked American and other seamen, and reciprocal aid to foreigners. It is a natural duty without such stipulation.

If a foreign army, fighting for the liberties of their country or its civil government, are forced by victorious oppressors into an adjacent country, though armed men, may be disarmed, they ought to be permitted, as individuals, to disperse and to depart in peace. And no demand for their delivery to their enemies should be listened to. As all men love freedom, so all are bound not to furnish facilities for the extension of tyranny and servitude. It is a settled principle in our Union to allow no pursuit into our territory of defeated armed men, of political offenders against foreign laws, and to permit such persons to enjoy the protection of our republic.

It is a well-settled principle of the law of nations that no nation is bound to enforce the penal laws, legal disabilities or military code of foreign nations, and that every sovereign State may grant or refuse an asylum to foreign fugitive criminals or persons charged with offences, whether they are *malum in se* or *malum prohibitum* only. This is the constant practice of Great Britain, France, the United States and other nations. (*Secretary Marcy's Letter in the Austrian case.*) Kings, princes and republican rulers of France have often found asylum in England, though it was refused to Napoleon Bonaparte under circumstances unfavorable to England's honor. In

the United States asylum is allowed to all political offenders of foreign nations, whether royalists or republicans; and Great Britain, according to the letter of the Earl of Granville of January 13th, 1852, and letters and declarations of her ministry in 1858, maintains the same doctrine. In our treaties, provision is made for surrendering foreign fugitive criminals guilty of crimes not political or military.

The right of asylum in this country was enforced in the case of the Spaniard Rey, abducted and transported to Cuba by the agency of the Spanish consul. He was sent back to New-Orleans.

Exiles owe duties to the countries where they enjoy asylum. They ought to abstain from interference with the governments whose hospitality they enjoy, as well as from offensive acts towards foreign nations calculated to involve the nation protecting them in difficulty. If foreign exiles fail to discharge these duties, they may properly be expelled from the countries whose hospitality they have violated.

SEC. 7. Nations generally, belonging to the Christian family, allow foreigners to domiciliate within their territories, and to pursue any peaceful occupation there. It rests upon the principle, do as you would be done unto, and foreigners ought to be freely allowed to reside and carry on business abroad so long as they continued to do so without disturbing the peace of the country, paying the ordinary property taxes imposed on citizens; as all property is protected, it ought alike contribute to the support of government. But foreigners are not bound to pay forced loans.

It would be wise in all commercial countries to allow foreigners engaged in commerce, manufactures and the mechanic arts, to hold real estate abroad for such purposes.

A nation cannot refuse citizens of foreign States per-

mission to enter its territory and trade, as freely as its own citizens, without justly incurring a charge of hostility. Mexico, before our war with her, violated this duty by forbidding foreigners, for the purpose of excluding citizens of the United States, from engaging in retail trade. (*Pres. Mess.* 1843, No. 2, p. 31.) She also decreed the expulsion of citizens of the United States from certain parts of her territory within a short period. These were hostile acts; and with numerous seizures of American property unpaid for at the time of the war, formed part of our claims, admitted by Mexico, and settled by the treaty of peace of 1848.

Foreigners are bound generally to obey the laws of the country where they may be, but if these are despotic, or are used oppressively by its courts or police to the injury of others, it is a wrong to their respective nations.

#### RIGHTS OF RESIDENT FOREIGNERS TO HOLD LANDS.

SEC. 8. In this enlightened day, when immigration is pouring hundreds of thousands of immigrants into the United States, and as our government conveys its public domain to foreigners and citizens alike, it is desirable that the reciprocal right of taking, holding and transmitting real or immovable property, as well as personal or movable, should be secured by treaties among all nations. Our republic, by treaty with France, in 1778, adopted this principle. (2 *Wheat.* 270, 271, n. c. 1 *Sandf. Ch. R.* 657.)

The *Code Napoleon* provides, in the true spirit of an enlightened age, that a foreigner shall enjoy in France the same civil rights as are or shall be accorded to Frenchmen by the treaties of that nation to which such foreigner shall belong. (*Code Nap.* B. 1, § 11. *Wheat. Int. L. P.* 2, c. 2, §§ 5, 6.)

Though the treaty of 1778 and the provisions of the Code have been annulled, a similar treaty, as to alienage, might well be negotiated by our republic with all nations.

By ordinance of July 14, 1819, the law of France gave to foreigners the right of taking, and transmitting by succession or by will, real and personal property to the same extent as Frenchmen enjoyed the right. This is in the true spirit of this age of progress.

The old system is founded on the feudal system, which received its death blow from the American revolution, speedily followed by that of France. The doctrine of the *Code Napoleon* grew out of that mighty revolution which threw down the pillars of the feudal temple. (2 *Wheat.* 271, n. c.)

The States of our Union have generally relaxed the common law disability of aliens. A municipal law of a State, as well as a treaty, removes the alien disability to hold and transmit lands in such State. (1 *Pet.* 343.)

The Constitution of Wisconsin (art. 1, § 15) adopts our principle as the fundamental law of that State. It declares that no distinction shall ever be made by law between resident aliens and citizens, with reference to the possession, enjoyment or descent of property. That of California, of 1849, (art. 1, § 17,) has the same principle of public law, in these words: "Foreigners, *bona fide* residents of this State, shall enjoy the same rights in respect to property as native-born citizens."

Many of our treaties provide for the security of property owned by our citizens dying abroad. (8 *U. S. St. L.* 56, 122, 166, 538, 556, 566.)

#### TAXES ON FOREIGNERS AND THEIR PROPERTY.

SEC. 9. Foreigners domiciled in a foreign country may be taxed, like citizens, for their property. (7 *Mass. R.*

523. *Ante*, ch. 3, §§ 3, 13.) But they are not liable to military tax or duty. (*Ib.* and 1 *U. S. St. L.* 271. *Const. French Rep.* 1848, ch. 9, § 101.)

SEC. 10. Foreigners are entitled to all rights of holding and transmitting property, and to all such exemptions from the municipal laws of another country as shall, by treaty between the two nations or by the *lex loci*, be stipulated. (6 *Pet.* 102. 10 *Ib.* 47. 8 *Wheat.* 464, 483. 7 *Cranch*, 603. 7 *Pet.* 610. 9 *Ib.* 367. 9 *Wheat.* 489. 3 *Ib.* 1. 4 *Ib.* 532. 10 *Pet.* 527.)

Americans have tribunals in Turkey and China by virtue of treaties. Our treaty with Algiers, (*U. S. St. L.* 247, art. 19,) confers a like power. So with Mexico. (*Ib.* 486.)

#### NATIONAL COMITY.

SEC. 11. Foreigners are entitled, in suits between themselves in a foreign country, to have their rights acquired and transactions done in their own country and under its laws, judged by those laws. This is a right by national comity, and founded upon the golden rule of the gospel.

#### AMERICAN REPUBLIC.

SEC. 12. Our public law provides for the family of municipal sovereignties of our Union, stretching from the Atlantic to the Pacific, and from the St. Lawrence to the Rio Grande, and covering an area approaching to that of Europe; with free commerce, free religion, and the constitutional guaranty of the principle that the citizens of each State shall enjoy in every other State of the United States, all privileges and immunities of citizens of the several States. (*Const. U. S.* art. 4, § 2.) This produces in each State uniformity of rights of property and per-

sonal rights; which ought to be secured by the law of nations to the whole family of nations. Aggregations of contiguous families of nations, with free representative governments, with municipal sovereignty reserved to each, and a general national government, and with a system of public law like that of the United States, seems to furnish the true model of a free State. Such a system dispenses with standing armies, wars, taxes and necessary poverty.

#### FREEDOM OF THE SEAS.

SEC. 13. The rights of all nations, and of their respective subjects or citizens, to the freedom of the seas are indisputable.

SEC. 14. The rights of citizens of neutral nations to immunity from belligerent action on the high seas, and with ports of the belligerents, are equally clear.

SEC. 15. The rights of citizens of belligerent nations during war, and at and after its conclusion, are set forth in chapter 13.

SEC. 16. Naturalized citizens, by incorporation and adoption, become entitled to all the rights of citizenship, with such exceptions as the laws of the adopting nation prescribe; and as such they have an equal right with native citizens to its protection, and they are bound to perform the same duties in peace and in war. This principle of public law must be deemed settled.

A declaration of an intention to become an American citizen and to renounce forever the foreign allegiance of an alien, is required by our acts of Congress, followed by five years' residence in our republic. After such declaration an alien is no longer entitled to the protection of the country he has abjured, but he becomes a *quasi* American citizen, and the shield of the republic is over him and must protect him. In the case of Koszta, he had abjured

his allegiance as a Hungarian to Austria, and had duly declared his intention of becoming an American citizen; and being at Smyrna, in Turkey, the Austrian consul caused him to be kidnapped and carried by force on board an Austrian man-of-war. Captain Ingraham, commanding an American armed vessel in that port, and the American consul, demanded the captive, as entitled to American protection, and threatened to take him by force, if necessary. The American and Austrian consuls agreed that the captive should be placed on shore with the French consul, there to remain until a joint consent of both parties should decide upon his delivery or liberation. The American government approved the acts of the energetic consul and gallant captain, and demanded the liberation of the captive. The act of the Austrian consul was an outrage on the sovereignty of Turkey, on the United States and the laws of humanity. (See *Secretary Marcy's Letter in Koszta's case.*)

In all cases, where an incipient naturalization has been commenced by an alien *bona fide*, he is entitled to the protection of the adopted nation, and he loses that of the country which he repudiates and abandons. (6 *Webster's W.* 521. *Secretary Marcy's Letter to Hulsemann, in Koszta's case.*)

Some nations require of foreigners, in order to admit them to a domicil for trade or pleasure, certain declarations, not understood by the parties to be an incipient step to naturalization, but merely as preliminaries to a domicil. Such as the Spanish laws enforced in Cuba, and which Daniel Webster, our Secretary of State, upon imperfect information, supposed an incipient Spanish naturalization, and on that ground he refused American protection to Mr. Thrasher, an American domiciled in Cuba, who was cruelly oppressed by the Captain-General and the pretended judicial tribunal that condemned him. (6 *Webst.*



W. 521.) After receiving full information from Mr. Thrasher and Consul Sharkey, he decided that an American might conform to the Spanish regulations for domiciliation without forfeiting his right to the protection of our republic, and that any oath compelled to be taken for the purpose of domicil, so far as it interfered with his duties as an American citizen, was and must be held void. (See *Webster's Letter to Consul Sharkey, July 5th, 1852.*)

It is clear that any such oath, or any unfriendly or expensive preliminaries to a domicil by an alien, prescribed by the law of any nation, or by the arbitrary order of any captain-general, king or other official, is a national wrong and indignity, and entitles the party injured and his nation to satisfaction. Every such unnecessary and unlawful preliminary to domicil by an alien friend, all violations of such alien's correspondence or newspapers from his own country, are unfriendly and wrongful acts, inconsistent with the treaties of commerce, as well as with the reciprocal rights and duties of all nations having intercourse with each other.

SEC. 17. The citizens or subjects of any nation may expatriate themselves, as we have shown, and unite themselves to any other, agreeable to its laws. (*Code Napoleon*, B. 1, tit. 1, ch. 2. *Webst. Dipl. and Of. Pap.* 97. 3 *Wheeler's Cas.* 585, 586.)

In the letter of our Secretary of State, Marcy, in Koszta's case, this doctrine is affirmed.

It is also maintained, as a principle of public law, that the country of the domicil of a foreigner may protect him from wrong by any foreign country, in its discretion. The Secretary says :

"It is not contended that this initiatory step in the process of naturalization invested him with all the civil rights of an American citizen ; but it is sufficient for all the purposes of this case to show that he was clothed

with an American nationality ; and in virtue thereof, the government of the United States was authorized to extend to him its protection, at home and abroad. Mr. Hulsemann, as the undersigned believes, falls into a great error—an error fatal to some of his most important conclusions—by assuming that a nation can properly extend its protection only to native-born or naturalized citizens. This is not the doctrine of international law, nor is the practice of nations circumscribed within such narrow limits. This law does not, as has been before remarked, complicate questions of this nature by respect for municipal codes. In relation to this subject, it has clear and distinct rules of its own. It gives the national character of the country not only to native-born and naturalized citizens, but to all residents in it who are there with, or even without, an intention to become citizens, provided they have a domicil therein. Foreigners may, and often do, acquire a domicil in a country, even though they have entered it with the avowed intention not to become naturalized citizens, but to return to their native land at some remote and uncertain period ; and whenever they acquire a domicil, international law at once impresses upon them the national character of the country of that domicil. It is a maxim of international law that domicil confers a national character ; it does not allow any one who has a domicil to decline the national character thus conferred ; it forces it upon him, often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. If a person goes from this country abroad, with the nationality of the United States, this law enjoins upon other nations to respect him, in regard to protection, as an American citizen. It concedes to every country the right to protect any and all who may be clothed with its nationality. These are im-

portant principles in their bearings upon the questions presented in Mr. Hulsemann's note, and are too obvious to be contested; but as they are opposed to some of the positions taken by Austria, the undersigned deems it respectful in such a case to sustain them by reference to authorities.

“ ‘The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral.’ (1 *Kent's Com.* 75.)

“ Again, the same authority says, that—

“ ‘In the law of nations, as to Europe, the rule is, that men take their national character from the general character of the country in which they reside.’ (*Ib.* 78.)

“ If Koszta ever had a domicil in the United States, he was, in virtue thereof, invested with the nationality of this country, and in this character continued as long as that domicil was retained. There are cases in which it is difficult to settle the question of domicil; but that of Koszta is not one of them.

“ The most approved definitions of a domicil are the following:

“ ‘A residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time.’ (1 *Binney's R.* 349.) ‘If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence of a few days.’ (The *Venus*, 8 *Cranch*, 279.) ‘Vattel has defined domicil to be a fixed residence in any place, with an intention of always staying there. But this is not an accurate statement. It would be more correct to say that that place is properly the domicil of a person in which his habitation is fixed, without any present intention of removing there-

from.' (*Story's Conf. L.* § 43.) 'A person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidence of an intention permanently to reside there as to stamp him with the national character of the State where he resides.' (*The Venus*, 8 *Cranch*, 279.)

"Apply these principles to the case under consideration, and the inevitable result is, that Koszta had a domicil in the United States. He came to and resided in this country one year and eleven months. He came here with the intention of making it his future abode. This intention was manifested in several ways, but most significantly by his solemn declaration upon oath. There can be no better evidence of his design of making the United States his future home than such a declaration; and to this kind of evidence of the intention, the indispensable element of true domicil, civilians have always attached importance. (*Phillimore*, § 188.) In the case of Koszta, we have all that is required to prove he had a domicil in the United States—the concurrence of an actual residence, with the intention to make this country his future home.

"The establishment of his domicil here invested him with the national character of this country, and with that character he acquired the right to claim protection from the United States, and they had the right to extend it to him as long as that character continued.

"The next question is, was Koszta clothed with that character when he was kidnapped in the streets of Smyrna, and imprisoned on board of the Austrian brig-of-war *Hussar*? The national character acquired by residence remains as long as the domicil continues, and that continues not only as long as the domiciled person continues in the country of his residence, but until he acquires a new domicil. The law as to the continuance and change of a

domicil is clearly stated in the following quotation from an eminent jurist :

“ ‘ However, in many cases actual residence is not indispensable to retain a domicil after it is once acquired ; but it is retained, *animo solo*, by the mere intention not to change it or to adopt another. If, therefore, a person leaves his home for temporary purposes, but with an intention to return to it, this change of place is not in law a change of domicil. Thus, if a person should go on a voyage to sea, or to a foreign country for health or for pleasure, or for business of a temporary nature, with an intention to return, such a transitory residence would not constitute a new domicil, or amount to an abandonment of the old one ; for it is not the mere act of inhabitancy in a place which makes it the domicil, but it is the fact coupled with the intention of remaining there, *animo manendi*.’ (*Story’s Confl. L.* § 44.)

“ At the very last session of the Supreme Court of the United States, a case came up for adjudication, presenting a question as to the domicil of General Kosciusko at the time of his death. The decision, which was concurred in by all the judges of the bench, fully sustains the correctness of the foregoing propositions in regard to domicil, particularly the two most important in Koszta’s case : first, that he acquired a domicil in the United States ; second, that he did not lose it by his absence in Turkey. (14 *How.* 400.)

“ As the national character, according to the law of nations, depends upon the domicil, it remains as long as the domicil is retained, and is changed with it. Koszta was, therefore, vested with the nationality of an American citizen at Smyrna, if he, in contemplation of law, had a domicil in the United States. The authorities already referred to show that to lose a domicil when once obtained, the domiciled person must leave the country of his resi-

dence with the intention to abandon that residence, and must acquire a domicil in another. Both of these facts are necessary to effect a change of domicil, but neither of them exists in Koszta's case. The facts show that he was only temporarily absent from this country, on private business, with no intention of remaining permanently in Turkey, but on the contrary, was, at the time of his seizure, awaiting an opportunity to return to the United States.

“ Whenever, by the operation of the law of nations, an individual becomes clothed with our national character, be he a native-born or a naturalized citizen, an exile driven from his early home by political oppression, or an emigrant enticed from it by the hopes of a better fortune for himself and his posterity, he can claim the protection of this government, and it may respond to that claim without being obliged to explain its conduct to any foreign power, for it is its duty to make its nationality respected by other nations, and respectable in every quarter of the globe.

“ This right to protect persons having a domicil, though not native-born or naturalized citizens, rests on the firm foundation of justice ; and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as the native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties ; he owes the same obedience to the civil laws, and must discharge the duties they impose on him ; his property is in the same way, and to the same extent as theirs, liable to contribute to the support of the government. In war he shares equally with them in the calamities which may befall the country ; his services may be required for its defence ; his life may be perilled and sacrificed in maintaining its rights and

vindicating its honor. In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable; and what reasons can be given why, so far at least as regards protection to persons and property abroad as well as at home, his rights should not be co-extensive with the rights of native-born or naturalized citizens? By the law of nations they have the same nationality; and what right has any foreign power, for the purpose of making distinction between them, to look behind the character given them by that code which regulates national intercourse? When the law of nations determines the nationality of any man, foreign governments are bound to respect its decision.

“ They would have no cause to complain if the protecting power should stand upon its extreme rights in all cases; but that power, in discharging its duties of protecting, may, for sufficient reasons, have some regard for the civil distinctions which its own laws make between the different classes of persons to whom it has the right, under international law, to extend its protection. It will naturally watch with more care, and may act with more vigor, in behalf of native-born and naturalized citizens, than in behalf of those who, though clothed with its nationality, have not been so permanently incorporated into its political community.

“ Giving effect to these well-established principles, and applying them to the facts in the case, the result is, that Koszta acquired while in the United States their national character; that he retained that character when he was seized at Smyrna, and that he had a right to be respected as such, while there, by Austria and every other foreign power. The right of a nation to protect, and require others to respect, at home and abroad, all who are clothed with its nationality, is no new doctrine now for the first time brought into operation by the United States. It is



common to all nations, and has had the sanction of their practice for ages ; but it is new, that at this late period, when the United States assert a claim to it as a common inheritance, it should at once be discovered that it is a doctrine fraught with danger, and likely to compromise the peace of the world. The United States see no cause for alarm ; no reason for renouncing for themselves what others have so long and so harmlessly enjoyed."

## AMERICAN PUBLIC LAW OF RACES.

SEC. 18. It is an obvious principle that every system of law must be adapted to the intellectual, social and moral condition of the people to be governed by it. Hence, in English jurisprudence, as it has expanded with British conquest and commerce over the French of Canada, the Hindoos and Musselmen in the East, different applications of law to these people and to the British races have arisen.

In the settlement of America by English emigrants, the Indians and Africans received at their hands a different system of law from that which English subjects brought with them as a birthright for their protection.

When our revolution commenced it found these diversities of law existing in the colonies, which, by their confederation, became the United States of America. Each State retained State sovereignty and its own laws, and the power of making citizens. By the compact of confederation, such citizens became citizens of the United States. Hence, every citizen of any State, on the 17th day of September, 1787, the date of the Constitution, became a citizen of the United States. If any colored persons or Indians were then citizens of a State, they and their descendants became American citizens by such prior State citizenship.



By the Constitution of the Union representation was based on free persons, persons bound to service for a term, three-fifths of all other persons, and excluding Indians not taxed. (Art. 1, § 2.) Section 1 states, that the Constitution was made by the people of the United States to secure the blessings of liberty to them and their posterity.

By sub-division 4th of section 8th of article 1st, Congress is exclusively vested with the power of naturalization, by uniform laws. (2 *Wheat.* 260.)

The acts of Congress confine naturalization to free white persons. (1 *U. S. St. L.* 414. 2 *Ib.* 153, 292. 4 *Ib.* 69.)

An act of Congress confides the defence of the nation exclusively to free white citizens. (1 *Ib.* 271.)

Indians, living in communities in a State under the protection of the United States and the Indian country set apart by it for their use, are exempt from the jurisdiction of the State and the action of its laws. (5 *Pet.* 1. 6 *Ib.* 515, 591—593.) When the power of self-government is lost by a tribe by its degradation, and the protection of the national government is withdrawn, these individual Indians become, like other residents, subject to State laws. (*Ib.*)

The condition of these scattered Indians, and of the free colored persons of African descent, is anomalous. In some of the States free colored persons are deemed citizens.

In Connecticut, according to the decision of Chief Justice Daggett, in *Crandell vs. State of Connecticut*, (10 *Conn. R.* 343—345,) free Indians and negroes are not citizens of the United States and of the State of Connecticut. (See, to same effect, 5 *Blackf. Ind. R.* 258. 8 *Ib.* 365.) In New-York a small portion of the free colored persons are deemed to be citizens, and the residue seem not to be such. In Wisconsin, colored persons are not

admitted to the right of suffrage ; while civilized Indians, not members of a tribe, are permitted to vote. The slave States, with unanimity, exclude free colored persons from the right of citizenship. (See *Constitutions and Laws of those States, and 4 Georgia R. 71, 72.*)

SEC. 19. The Institutes of Bouvier, (vol. 1, pp. 17, 70,) the repeated decisions of our Secretaries of State of the United States, and the uniform executive and legislative action of the national government, settle the doctrine, that the Constitution and laws of the United States do not include colored races under the term citizens of the United States, except in a few particular cases where, at the adoption of the Constitution, a State had conferred already citizenship for some meritorious public service. The Dred Scott case, in the Supreme Court of the United States, was an affirmation of this doctrine. (19 *How.* 393.)

The result of this doctrine is, that colored persons, free and slave, in our States and territories, are regulated and protected by the municipal laws. (4 *Georgia R. 71, 72.* 4 *Alabama R. N. S. § 66.*)

According to Judge Daggett they are not citizens of the United States, and not entitled to pass into any State from another when the law of the former prohibits it. The Supreme Court of Indiana has so decided.

Under their police powers, the States may prohibit free persons of color, if not citizens of the State, within the meaning of section 2d of article 4th of the Constitution of the Union, and slaves, from entering the States respectively ; unless a treaty of our republic or an act of Congress shall otherwise provide. (14 *How.* 13. 11 *Pet.* 131, 132, 137, 139. 15 *Ib.* 508.)

SEC. 20. The States respectively have power to exclude alien paupers and criminals, or such colored persons from entering their territories ; subject to the controlling and paramount effect of treaties and acts of Congress. (*Ib.*)

## AMERICAN PUBLIC LAW OF LIBERTY.

SEC. 21. The constitutions, State and national, secure the liberty of all free persons within their territorial jurisdictions. The *habeas corpus* removes restraints upon liberty not authorized by our treaties or by the national or State laws. (2 *Kent's Com.* 2d ed. 26. 2 *Grattan's Virg. R.* 588. 6 *Barb. S. C. R.* 367.)

All cases of extradition of criminals under our treaties, or of fugitive criminals or fugitive persons from other States, who are, by their laws, bound there to service, belong exclusively to the President, Secretary of State, the national judges and judicial officers designated by law; and the State courts and legislatures have no power to impede their action, or to review their decisions by means of the writ of *habeas corpus* or otherwise. (4 *How.* 20. 1 *Ib.* 301. 14 *Pet.* 574—578. 16 *Ib.* 622. 2 *N. Y. Rev. St.* 2d ed. 466. 2 *Kent's Com.* 29.)

In Booth's case, (21 *How.* 506,) the Supreme Court of the Union held, that a person arrested by the legal process of a national court or judicial officer, could not be delivered from such arrest by *habeas corpus* by a State court. That in such a case a State court has no jurisdiction.

So far as an act of Congress authorizes a State magistrate or officer to aid in extradition, he may do so, though not obliged to act.

In all purely municipal matters the State courts have exclusive jurisdiction, and in such cases, where an illegal restraint of personal liberty occurs, the State judiciary can alone remove it by using the writ of *habeas corpus*. (5 *How.* 104, 115. 2 *Ib.* 65.)

In Sims' case, (7 *Cush. R.* 285,) the Supreme Court of Massachusetts, and the Supreme Court of Pennsylvania in

several cases, have refused to take jurisdiction by *habeas corpus* of cases of arrest by process of the national courts. (7 *Barr. Penn. R.* 336.) In such cases, if the State court finds one legally arrested by authority of a national court, its authority ends. In the Sims case, the court say: "We do not mean to say that this court will in no case issue a writ of *habeas corpus* to bring in a party held under color of process from the courts of the United States, or persons whose services and the custody of whose persons are claimed under authority derived from the laws of the United States. This is constantly done in cases of soldiers and sailors, held by military and naval officers, under enlistments complained of as illegal and void. But it is manifest that this ought to be done only in a clear case, and in cases where it is necessary to the security of personal liberty from illegal restraint."

## EFFECTS OF EXTRADITION.

SEC. 22. In all cases of extradition of foreign criminals pursuant to our treaties, or fugitive criminals, or fugitive persons held to service, agreeable to our constitutional compact, the treaties and acts of Congress specify the persons, President, governors, judges, commissioners, &c., on whom the power of making orders is exclusively conferred. (See *Treat.* 1 *U. S. St. L.* 302. 2 *Ib.* 116, § 6. *Fugitive Act of 1850.*)

An order for extradition, made by an officer having jurisdiction by law, is conclusive for the mere purpose of extradition. (*Ib.*)

If such an order is obtained by any person upon fabricated affidavits, by fraud or perjury, the order for extradition is no protection to any party procuring it or enforcing it with knowledge of the fraud or perjury. (3 *How.* 98. 8 *Ib.* 540, 541. 5 *Wend.* 173. 2 *Phil. & Ames on*

*Ev.* ed. 1839, p. 550, and n. a. 2 *Kent's Com.* 2d ed. 118. *Story's Conf. L.* 2d ed. §§ 586, 609, 697. 5 *Georgia R.* 279.) A want of jurisdiction alone makes void a judicial decree or decision. (*Ch.* 4.)

The officer making the order, and his ministerial assistants executing it, are protected, but the parties to the fraud are liable civilly and criminally, as every order, judgment or decree obtained by fraud is void as to all parties to it, and the fact may be shown collaterally when such adjudications are set up in any court. (*Ib.* and *Ch.* 4. 1 *Cushing's Mass. R.* 571.)

The act of Congress organizing the territorial governments of Kansas and Nebraska, passed in 1854, confers the right of suffrage on free white male citizens of the United States, and on such free white aliens as shall have duly filed their intentions to become citizens of the United States, and have taken an oath to support the Constitution of the Union. As these territories are occupied by many Indians and a few negroes and whites, the act in effect declares, that free white persons alone compose the governing power of our republic. It, of necessity, repels the idea that free Indians and negroes are citizens of the United States.

#### STATUS OF THE PEOPLE OF A STATE.

SEC. 23. The *status* or political and social condition of all persons domiciled within a State of our Union are fixed by its constitution and laws, except so far as the Constitution of the United States and its treaties shall otherwise provide. In *Strader and others vs. Graham*, the Supreme Court of the Union decided this point as follows, Chief Justice Taney delivering the opinion of the court:

“ This case is brought here by writ of error directed to the Court of Appeals of the State of Kentucky.

"The facts in the case, so far as they are material to the decision of the court, are briefly as follows: The defendant in error is a citizen of the State of Kentucky, and three negro men, whom he claimed and held as his slaves, were received on board the steamboat Pike, at Louisville, without his knowledge and consent, and transported to Cincinnati, and from that place escaped to Canada, and were finally lost to him.

"The proceedings before us were instituted under a statute of Kentucky, in the Louisville Chancery Court, against the plaintiff in error, to recover the value of the slaves which had thus escaped; and in default of the payment by them, to charge the boat itself with the damages sustained. Strader & Gorman were the owners of the boat, and Armstrong the master.

"The plaintiff in error, among other defences, insisted that the negroes claimed as slaves were free; averring that some time before they were taken on board the steamboat, they had been sent, by the permission of the defendant in error, to the State of Ohio, to perform service as slaves; and that in consequence thereof they had acquired their freedom, and were free when received on board the boat.

"It appears by the evidence that these men were musicians, and had gone to Ohio on one or more occasions to perform at public entertainments; that they had been taken there for this purpose with the permission of defendant in error by a man by the name of Williams, under whose care and direction he had for a time placed them; that they had always returned to Kentucky as soon as this brief service was over; and for the two years preceding their escape, they had not left the State of Kentucky, and had remained there in the service of the defendant in error as their lawful owner.

"The Louisville Chancery Court finally decided that

the negroes in question were his slaves; and that he was entitled to recover \$3,000 for his damages. And if that sum was not paid by a certain day specified in the decree, it directed that the steamboat should be sold for the purpose of raising it, together with costs of suit. This decree was afterwards affirmed in the Court of Appeals of Kentucky, and the case is brought here by writ of error upon the judgment.

“Much of the argument on the part of the plaintiffs in error has been offered for the purpose of showing that the judgment of the State court was erroneous in deciding that these negroes were slaves. And it is insisted that their previous employment in Ohio had made them free when they returned to Kentucky.

“But this question is not before us. Every State has an undoubted right to determine the *status* or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return. The Court of Appeals have determined that by the laws of the State they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it.” (10 *How.* 93.)

The court also held, that when a State formed a constitution and was admitted into the Union, in the territory



northwest of the Ohio, the ordinance of 1787, and the act of Congress of 1789 enforcing it, and all the acts of Congress regulating its municipal law, were superseded by the State constitution and laws, and that these fixed the rights and duties of all persons domiciled there, except so far as they were restrained by the Constitution of the Union. And the learned chief justice cited to this effect Pollard's *Lessee vs. Hagar*, (3 *How.* 212,) *Permili vs. New-Orleans*, (3 *How.* 589.) The court concluded: "This court has no jurisdiction of the case, and the writ of error must, on that ground, be dismissed."

It follows, from the principle of this decision, that each State and its tribunals are the sole judges of what constitutes slavery there, provided the Constitution of the Union and its treaties on the rights of foreigners are not violated.

It must not be inferred from this decision, that the freedom of navigable rivers and of carrying places, and other great principles of liberty and of American public law, declared by the ordinance of 1787, are abrogated in the States northwest of the Ohio. The municipal law alone is changed. Our public law, declared by American constitutions, the ordinance of 1787 and compacts between the States and the national government, remain legislative expressions of American law.

## EMANCIPATION.

SEC. 24. In the United States, and North and South America and the West Indies, the aboriginal colored races have been treated by the English, French, Spanish, Portuguese and other European nations in colonizing the country as inferior and dependent races. When our republic, in 1776, arose, this state of things was firmly established, and with improved humanity it has continued to this day.



In the United States many African or negro slaves were found, and their descendants, greatly increased by Christian civilization and kind treatment of their masters, now amounting to three millions, are in a better condition than any of the sons of Ham in Africa.

In the States of our Union and in the territories the personal rights of these persons are protected by the State laws in the States and by acts of Congress in the territories, and these within their respective jurisdictions regulate the right of emancipation and the local political condition of the free men and women.

A State may confer the right of voting on Indians or negro free men, but it cannot give them the character of citizens of the United States and its rights and privileges. The Supreme Court of the United States so decided in the Dred Scott case. (19 *How.* 393.)

In *Williams vs. Ash*, (1 *How.* 12,) the Supreme Court of the United States held, that a petition for freedom was properly allowed, where a Maryland slave was by will devised his freedom by his master in case a man to whom his master bequeathed him first by the will should sell the slave, and he did sell him, as the laws of Maryland allowed such a devise of freedom on such condition. By the law of the master's domicil in this case, a slave was allowed to be a legatee of his own freedom, and for this purpose and many others the laws of this and other Southern States consider slaves as persons, and entitled to the protection of law.

Emancipation of slaves, pursuant to law, confers upon the emancipated such political and personal rights as it shall prescribe. The *lex loci* cannot, however, confer on freed persons any extra-territorial rights. Such emancipation may arise not only from the action of the *lex loci* of the residence of the master and slave, but also from that of any other nation, State or sovereignty into which

slaves, with their owner's consent, may be carried, in violation of the law or policy of the latter. (16 *Pet.* 609. 12 *Conn. R.* 38. 2 *Marshall's R.* 470. 2 *Kent's Com.* 257, n. a. 9 *Louis. R.* 473. 13 *Ib.* 441.)

Every State of our Union, as a municipal sovereignty, possesses this power. (2 *Kent's Com.* 256, 257, n. a.)

Congress also possesses it in the District of Columbia and in the national territories, and has exercised it. (2 *U. S. St. L.* 116, 286. 1 *Ib.* 53, 302. 4 *Webster's W.* 374—376.)

The *status* of the population of every sort, within the United States, depends upon the *lex loci* of their locality. (10 *How.* 93.) The State or national law having jurisdiction, determines that *status*. (*Ib.*) The same principle applies to all nations. The Amistad negroes were discharged by a decree of the Supreme Court of the United States, because they were not legally held as slaves by the Spanish law. (6 *Webster's W.* 401.)

Our Constitution secures to masters a right to retake their slaves flying from one State into another. Acts of Congress apply the same law to our territories and the District of Columbia.

In *Josephine vs. Poultney*, (1 *Louis. An. R.* 329,) the Supreme Court of Louisiana decided, that if a master take a slave to a free State, and the latter, by residence there, becomes free, the condition of slavery is not restored by a return of the former slave to the master's service in Louisiana. A similar decision has been lately made by the Court of Appeals in Kentucky in the case of *Clarissa*, (1 *Am. Law Reg.* p. 495.) This is right upon principle, and is in effect emancipation by the act of the master. The right of a master with his slaves to pass from one State to another, through a free State, and retain them, is not affected by these decisions. (*Ib.* 298.)

In *Strader and others vs. Graham*, (10 *How.* 93, 94,)

the court held, that the entry of slaves into a free State with their master's consent, under charge of his agent, for a temporary purpose, followed by their return to the master's service in Kentucky, did not emancipate the slaves, and that their master retained his ownership, and right to sue a party that afterwards aided the slaves to escape. On error to the Supreme Court of the United States it was decided, that the *status* of the slaves depended on their return upon the laws of Kentucky, and not upon those of Ohio, as no provision of the Constitution of the Union applied to such a case, and that the exposition of the local law by the Court of Appeals was conclusive on the Supreme Court of the Union.

It seems to follow, from these authorities, that the mere entry of a slave into a free State, with his master or his agent, *in transitu* to another State, or for a temporary purpose, could not emancipate the slave; but that if he be permitted to obtain a domicil in a free State, he is deemed emancipated by the master's consent.

But the national Constitution makes slave property subject to direct taxation by Congress, and guarantees each State against insurrections, servile as well as others. At the adoption of that instrument slavery, by British policy and cupidity, existed in most of our States. We have eighteen free States and fifteen slave States, and Kansas, the nineteenth free State, is organized and will soon be admitted into the Union.

The Constitution confers on American citizens free ingress into and egress from, and transit through, every State with their property, without any tax, toll or impediment.

While State sovereignty clothes the States with a general jurisdiction over all persons within their territories respectively, national and inter-state comity create exceptions and limitations to that power. All will admit that,

if a Virginia or Kentucky planter were removing with his slaves to Missouri, by steamer, and she were to land for supplies on the Ohio, Indiana or Illinois shore, interstate comity would forbid any interference by either of those States or tribunals to free such slaves. If such planter and slaves were to land at Cairo, and await the arrival of a steamer to take them to St. Louis, the slaves could not be set free for the same reason. Now, if they were to pass across either of those States to their new domicil in Missouri, the case would be substantially the same. Every State is bound to protect such transit to any State, and during a temporary residence, provided the master's domicil is in the United States and out of such State. This rests upon constitutional comity.

It grows out of a universal practice at the adoption of the Constitution of the Union, and the relation of unity created by it between the States.

In *Jones vs. Van Zandt*, (5 *How.* 229—231,) the Supreme Court of the United States unanimously held, that the act of Congress of 1793, allowing the arrest of fugitive slaves in the States and territories of the Union, was constitutional, and did not conflict with the ordinance of 1787, securing freedom and prohibiting slavery in the northwest; and the court treats the ordinance as valid, and a doubt of it is not suggested by Mr. Justice Woodbury, who gave the unanimous opinion of the court. The court held that slavery, or a right of property in man, was a political question, settled by each State for itself; and the federal power over it was limited and regulated by the people of the States in the Constitution itself, as one of its sacred compromises, which the court had no power to modify or change. One of those compromises, the court said, was the right of recaption of fugitive slaves. The reason of that provision, the court say, was that, by national law, the power to pursue and regain

most kinds of property, in the limits of a foreign government, was a matter of comity rather than strict right, and that as the right of property in persons might not be recognised in some of the States in the Union, and its reclamation not allowed through either courtesy or right, that provision was made for the safety of that portion of the Union which did permit such property, and which otherwise might often be deprived of it entirely by its merely crossing a line into an adjoining State. It was, say the court, deemed too hard to deprive a friendly neighbor of his right to such service, without the master's consent, by the escape of persons bound to service. The Supreme Court, as this case shows, had not a doubt of the validity of the prohibition of slavery by the ordinance of 1787.

Congress may admit or exclude slavery in the District of Columbia and in the territories.

All of the acts of Congress organizing our territories and States, and all naturalization acts of Congress, confine American citizenship to free white persons.

Colored persons are a basis of political representation, not as property, but as rational beings of an inferior race in a state of pupillage, with qualified personal rights, and such political privileges in each State as its laws may confer.

Since the above was written, in the case of Dred Scott, (19 *How.* 393,) the Supreme Court of the United States, by a majority, has decided that Scott, a man of African blood, a slave, temporarily carried into a free State and territory by his master, was not thereby emancipated, and if he was, that he was not a citizen of the United States and a citizen of Missouri, his residence, within the true meaning of the Constitution of the United States, and that the national courts had no jurisdiction of the parties or of the question of emancipation, and that the merits of

the case belonged exclusively to the State courts, and the appeal was dismissed on the ground of want of jurisdiction. The minority of the court differed from the majority on that point as well as others discussed. This decision of want of jurisdiction, of necessity decides that the court had no power to judge the merits of the case, the invalidity of the Missouri Compromise Act of Congress, the non-emancipating effect of such temporary residence in a free State or territory, or any other matter relating to the question of emancipation, the only issue on the merits in the case.

Extra-judicial suggestions of judges have not, in any case, an authoritative force, and in this they directly contravene the unanimous decision of that high court as given by Chief Justice Marshall, in the case of the American Insurance Company *vs.* Canter, (1 *Pet.* 542, 543, 546.) In that case the court say: "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence it is derived, the possession of it is unquestioned." And the court, at the conclusion of their discussion of the plenary power of Congress to legislate for all our national territories, say: "In legislating for them, Congress exercises the combined powers of the general and of a State government." This being a decision directly in point on a question within the jurisdiction of the court, binds that court, and all others in our Union, as an authoritative exposition of the Constitution. And it is in accordance with the unquestioned legislation of Congress for more than half a century, and generally

concurred in. (1 *U. S. St. L.* 50, 51, 123, 549, 550. 2 *Ib.* 58, 59, 283, 286, 287, 309, 514, 515, 743. 3 *Ib.* 493, 494, 658, 659. *Missouri Compromise Act*, 3 *Ib.* 548, § 8. 6 *Ib.* 600. 5 *Ib.* 15, § 12. *An Act declaring void acts of territorial legislatures*, 5 *Ib.* 61.) These acts and others, excluding slavery from all our then territories by the ordinance of 1787, and from Oregon and Washington territories, and these and many others legislating to prohibit slavery in the national territories north of latitude 36° 30', and in the Northwest Territory, to emancipate slaves brought into them, and at times allowing slavery in some of them, at others specially passing acts of Congress to allow persons named to bring their slaves into the District of Columbia, and legislating with a plenary power over every matter—these all accord with the doctrines of the Supreme Court in the *American Insurance Company vs. Canter*.

The result of these authorities must, therefore, be, that colored persons of African descent and individual Indians are not citizens of the United States, and that their *status* in the States of our Union depend upon State laws, and that they must look to them and to the State courts for their rights and their protection, and that Congress has plenary powers of legislation over all our national territories, subject only to the express limitations of the national Constitution.

Congress has never yet legislated to establish slavery in any free territory, and it may well be doubted whether any territorial law effecting that object is constitutional. The first effort of this sort has been made in Kansas, and the popular judgment expressed in the constitution just adopted for the new State has annulled slavery.

The case of Scott led some of the judges to suggest their views on the extra-territorial rights of a master to go into and through the free States and territories of the



Union. Slavery, by the law of England and by American law, is local, and depends for its support on the law of the State allowing it. It is not favored in our Christian States, and has no extra-territorial rights, except those guaranteed by or arising from the national compact. It provides, that "no person held to labor or service in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due." This right of recaption relates to apprentices and slaves escaping from one State into another State, and does not include the territories; and the right of recaption in the latter depends wholly on acts of Congress passed for that purpose. No extra-territorial right is given by the Constitution to slave owners to remove with their slaves into the territories, and without an act of Congress no such right can exist. As Congress, in the territories, combines the municipal power of the States and that of the general government, a plenary right to admit or exclude slavery by act of Congress, it would seem, exists in that body.

Slaves partake of a double character of persons and of property in slave States. And, owing to this fact, free and white labor cannot mingle to any great extent; hence Congress has silently allowed it in southern and southwestern territories, and excluded it in more northern ones, where free labor was preferable. Though slaves are property for the purpose of national direct taxation and of recaption, they are, by the fugitive slave laws, recognised as persons having a right of trial, and the national Constitution treats them as such for a three-fifths representation. No argument, therefore, can be drawn from the Constitution to confer on the master a right of removal to free territory with his slaves from any State.

But the comity of our system requires that an uninter-



rupted transit should be allowed through a free State to a master and his slaves going from one State to another, if they are orderly and do not violate the public peace. The same comity requires that a master travelling through a free State, or temporarily dwelling there, for pleasure or business, should not be deprived of his colored servants or slaves attending him, by the laws or tribunals of any State. Laws of States allowing masters nine months residence with their slaves or servants without molestation, would comport with the comity belonging to our Union, and would do much to promote good feeling and useful commerce.

Emigration from Europe and the free States, the annexation of tropical islands in the vicinity of the United States, and the all-powerful movement towards those regions of our slave population from the superior value of slave labor there, these causes will, in half a century, put an end to the tendency of our servile population to our territories on the continent of America, by a process beneficial to them as well as to the whole American people. Half a century hence, when Providence shall have solved the question of slavery, forced upon our country by the cupidity of English merchants and princes, all these subjects, now so agitating, will have been put to rest by the benign dispensations of our Heavenly Father, for the common benefit of both the white and colored races.

#### SLAVERY, EMANCIPATION, CITIZENSHIP, &c.

It is important to consider the tribunals that have jurisdiction of the question of citizenship of the United States, and of the *status* of the white and colored races that are now or may be brought within the United States.

In the case of the *Amistad*, (15 *Pet. U. S. R.* 520,) it is settled that where persons, claimed as slaves, had been

kidnapped and carried from Africa to Cuba contrary to the Spanish laws, and in going from one Cuban port to another the Africans rose and killed those who restrained them, and compelled their masters to navigate them back to Africa, and they brought them to the United States, that in this case the negroes were free, and the Supreme Court of the United States decreed their freedom accordingly. In all cases of the arrival in our ports of foreign or American vessels from foreign ports with persons held on board as slaves, jurisdiction of their *status* and condition seems to belong to the government and courts of the United States. The former has exclusive control of our foreign relations, and the latter, by its admiralty and its other powers as a national judiciary, seems to be the proper tribunal to decide on questions of an international bearing.

The questions of who are and who are not citizens of the United States belongs to all the courts, State and national, but all the State tribunals must conform their decisions on this subject to those of the Supreme Court of the United States, as that is a high national court, whose decisions are binding on all State tribunals. In the Dred Scott case a majority of the Supreme Court of the Union held that Scott had no *status* in court; that as a slave, who had temporarily sojourned with his master in a free State and a free territory, he did not and could not thereby become a citizen of the United States, and that emancipation would not make him such, and that the national courts had no jurisdiction of the case, as he was not a citizen of the United States. The court held the African race a dependent one, and that our national Constitution was made by the white dominant race for themselves and their posterity, and that the colored, inferior and dependent races, as individuals, have only such political rights as the States may respectively allow them.

Hence it follows, that all questions of the *status* of the populations of the States respectively belong to their State tribunals, and that no such suit can be brought in the national courts. A minority of the court held otherwise, but the decision must be deemed to settle this point, and, as a necessary consequence, the State courts alone, in the respective States, can decide what shall emancipate a slave, his *status*, and all other questions touching the political and civil rights of individuals of the colored races. As to these questions arising within the States, the Supreme Court of the United States have no jurisdiction, and any opinions of the judges of that high court on these purely State questions, or on any others not necessary to the decision of the want of jurisdiction, would, of course, not be binding as authority.

In the Dred Scott case, the court holding that they had no jurisdiction of the parties or of the cause, it seems to be a logical sequence that the court had no authority to decide the merits of the case, the validity of the ordinance of 1787, or of that of the Missouri Compromise Act, as the want of jurisdiction being adjudged, the case in that court was at an end.

As our States and their tribunals have a general municipal jurisdiction over all persons within their territorial limits, except the few specific and exclusive grants of power conferred upon the national government, and subject also to the exceptions of national and inter-state comity, the colored races, as well as other persons, must, in the main, look to the State governments for protection. The condition of colored persons is a municipal matter belonging to each State where they reside, and not to any other State or to the United States.

As our States generally had slaves at the adoption of the Constitution, it would seem that the right to remove from one State to another slave State with slaves, passing

through any intervening one, must have been a right of comity. If so, the right of travelling and temporarily sojourning in a free State, with servants or slaves, would also be a right of comity.

In the territories of the United States Congress has plenary power of legislation on all subjects, the *status* of colored persons among others, and may regulate their civil and political rights with full, conjoint State and national authority. Of course, an act of Congress may exclude slavery from all or any of the national territories, or allow it therein. (See 1 *Pet.* 242, 243.) Chief Justice Marshall, giving the unanimous opinion of the Supreme Court of the United States, affirms this doctrine.

The ordinance of 1787, drawn by Jefferson originally, and re-affirmed in 1789 by the first Congress by a solemn act of confirmation, signed by Washington as President and John Adams as Vice-President, and a long line of acts of Congress relating to our territories, passed without objection and generally acquiesced in for more than half a century, show that the plenary legislative power of Congress over the territories was "unquestioned," and a settled principle of American law. (1 *U. S. St. L.* 50, 51, 123, 285, 286, 549, 550.) In organizing the Mississippi territory the act of Congress again affirmed the ordinance of 1787, as the pattern territorial government, excluding the article prohibiting slavery. (*Ib.* 549, 550, § 3.) A long line of acts of Congress, including the act excluding slavery from Oregon Territory and north of latitude 36° 30' in Louisiana, except the State of Missouri, extend through half a century, approved at different eras by Jefferson, Washington, John Adams, Madison, Hamilton, Monroe, John C. Calhoun, and by the great body of statesmen, lawyers and judges of our republic, and ratified by the unanimous decision of the

Supreme Court of the United States in 1828, must settle this great principle of American law.

It is remarkable that the African republic of Liberia has introduced into its Constitution the same principle which belongs to the Constitution of the United States, only in reverse form. Our Constitution rests on the doctrine that it was made by free white men for themselves and their posterity, and that the Caucasian race of Americans are the governing power. That of the African republic vests Liberian citizenship in the African race exclusively, and disqualifies any but Liberian African republicans from holding real estate in the African commonwealth. The wisdom of each Constitution is apparent; as the colored man here is, and ever will remain in a position of social and political inferiority, to allow white men to settle in and rule Liberia would prevent the African race from making successfully their first effort at self-government.

#### SLAVERY FOR CRIMES.

SEC. 25. State laws may condemn their resident population or persons subject to their jurisdiction to slavery for crimes against their laws, provided they are not in conflict with State constitutions, with our treaties, the Constitution of the Union, or of acts of Congress passed in pursuance of it. (*Const. Ohio*, art. 8, § 2. *Const. Mich.* 11, § 1. *Const. Calf.* art. 1, 18, and other State constitutions.) The exertion of this power is so repugnant to American feeling that its original exercise may deemed undesirable and unwise.

The States, by virtue of their sovereignty, may pass any police laws not in conflict with our treaties, the national Constitution and acts of Congress, to prevent servile insurrection and inundations of slaves, of Indians or of free colored persons, but they ought to exercise this high power

in a spirit of humanity as well as of comity towards foreign nations and other States of our Union.

#### EMANCIPATION BY THE LAW OF NATIONS.

SEC. 26. We have examined, in Chapter four, to some extent, this subject: One nation, by the law of nations, if no treaty obligations exist, is not bound to regard any right of a master over a slave founded upon a foreign law, as it is deemed strictly local, and not entitled to any extra-territorial effect. (16 *Pet.* 609. *Somerset's case*, *Loft's R.* 1. 11 *State R.* (Har. ed.) 340. *Story's Confl. L.* 2d ed. § 96, n. 1, 2.) National comity is, however, applicable to vessels forced into foreign ports.

By the Constitution of the Union, adopted by the national convention on the 17th day of September, 1787, the importation of slaves into the United States, established during our colonial dependence by Great Britain, Congress was authorized to prohibit, after 1807, the importation of slaves. (Art. 1, § 9.) America thus took the lead in abolishing the African slave trade. (2 *Story's Const.* § 1334.) In March, 1794, Congress passed a severe law against carrying on the slave trade from the United States, and in 1807 wholly interdicted the importation of slaves into our republic, to take effect in 1808. (1 *U. S. St. L.* 347, and 12 a.) Subsequent acts of Congress have made such importation piracy. The doctrine of *Somerset's case* must then be deemed the international law of the Union, that every foreign slave that treads the free soil of the republic is emancipated and free.

If a foreign ship, with slaves, is driven into the ports of this country by stress of weather or necessity, by national comity the *lex loci* does not and ought not to interfere to destroy the legal rights of the master over slaves on board, provided there is no unnecessary delay in port

or attempt to trade. This is a principle of the law of nations and of American public law, as among our States, with the additional obligation of inter-state comity.

And there is no power in the executive of any State, or in the President of the United States, to deliver to his master and re-manacle an imported slave emancipated by the policy of American law.

In the *Amistad* case, (15 *Pet.* 518,) where Africans had recently been stolen from their country and sold illegally as slaves in Cuba, to certain Spaniards, who put them on board the *Amistad* to go from one Spanish port to another, and the slaves rose and took the vessel by force, and she was found in American waters, and was libelled by her captors for salvage, and the Spaniards claimed the slaves; the Supreme Court of the United States properly decided, that the slaves, being made so against Spanish treaties and laws, were free, and the court ordered their discharge. In such a case, if the *Amistad* had been driven into our ports by stress of weather while the slaves were under the control of the Spaniards, it would have been the duty of our courts, on *habeas corpus*, to discharge them from such illegal duress.

It is a fact to the honor of our republic, that our Congress first declared the slave trade piracy, and has steadily proscribed the inhuman traffic. (See *Secretary Cass' Letter to Lord Napier, April 10th, 1858.*)

#### RIGHTS OF AMERICAN CITIZENSHIP.

SEC. 27. Our national Constitution declares, that the citizens of each State shall enjoy the privileges and immunities of citizens in the several States. This gives nationality to American citizens in all the States of the republic. Our courts have given a construction to this provision. (2 *Story on Const.* 2d ed. § 1806.)

But the term American citizen is confined to the Cauca-



sian race and to such colored persons only as were citizens fully of a State at the adoption of the Constitution of the Union, and their descendants. It excludes the colored races, Indians, Negroes, Chinese, Hindoos, &c.

In *Corfield vs. Coyell*, (4 *Wash. S. C. C. R.* 373, 378, 379,) the United States Circuit Court decided, that a State had a right to confine the enjoyment of its oyster-beds to its people, and exclude non-residents therefrom; that the laws of a State regulating the use and enjoyment of such beds were valid, provided the navigation was left free, and they were not in conflict with acts of Congress regulating commerce with foreign nations or among the States.

The court decided, (pp. 380, 381,) that the clause of the national Constitution conferring on all the citizens of each State "the privileges and immunities of citizens in the several States," was to be limited to such as are "fundamental; which belong of right to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent and sovereign." Among these American rights are (say the court) "protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State." These, the court say, are funda-



mental privileges and immunities of citizens; "to which may be added, the elective franchise, as regulated and established by the laws and constitution of the State in which it is exercised."

But the court decided that a State, in regulating the common property of the State, is not bound to extend to citizens of other States the same advantages that are secured to its own citizens. Hence, say the court, a State may grant a right of fishery to individuals, or limit it to all the people of the State. Freedom of speech and of the press, and security of life, liberty and property, are universal American rights.

One important right of American citizenship is free access to all State courts, to enforce foreign contracts and rights of person and property acquired under the laws of any other State of our Union. This rule is subject to the qualification, that such contract or transaction be not in fraud of the *lex fori*.

In *Livingston vs. Tompkins*, (4 *Johns. Ch. R.* 430,) Chancellor Kent lays down the doctrine that, under the national Constitution, the citizens of each State are entitled to free ingress and egress into and from every State, and to all the immunities of the citizens of each State of our Union.

The question arises, what is this great right of American citizenship in the administration of justice in State courts where citizens of different States are parties? The Constitution obviously requires that State laws and State courts should establish and enforce uniform rules of law and justice, so far as the right of the case is concerned, whether the parties to be affected are citizens of one or more of the States of our Union. As to American citizens, no discrimination in the principles of administering justice, the descent of property, its security or the protection of persons, is allowed by the Constitution. (*Ib.*

8 *How.* 493.) This does not, however, prevent the States from passing laws to require security from non-resident parties to suits to appear and pay or perform judgments and decrees of the courts of the State, or from foreign trustees, seeking to administer property in a State, that all legal claims there on the trust fund shall be satisfied before removal or administration of the property or trust. These are rights of sovereignty attaching to the property, or temporarily to parties sued within a State. (*Ib.*) This qualification of the principle is necessary to a complete administration of justice, and does not affect equality of decisions in State tribunals, without discrimination as between citizens of the different States of our Union.

#### RIGHTS OF FOREIGN CORPORATIONS.

Questions have arisen as to the power of States by law to limit, regulate or prohibit the circulation of foreign bank bills of certain descriptions, and as to their authority to demand security from foreign corporations or associations for their faithful performance of the contracts made in such States, as a condition of transacting business there. Each legislature is limited in its power to its territory, and its banks and corporations are local there, and its laws, *ex proprio vigore*, do not extend beyond the State, and the allowance of bank paper and foreign insurances, seems a mere matter of national comity, beyond the State creating the corporations or associations. (16 *Pet.* 447.) Municipal sovereignty makes it the right and duty of the States, by their laws, to protect their citizens and residents from injury arising from the legislation of other States, so far as their respective territories and jurisdictions are concerned, subject to the limitations of the national and State constitutions. And such has been the practice of the States.

Bouvier (1 *Institutes*, p. 83, § 195) says, that the corporations created by the States of our Union are, in reference to other States, foreign corporations, and cannot carry on business there except by consent of the State and the comity of nations, as one State cannot extend its laws over another. He says such corporations may sue in the courts of other States.

Clark *vs.* New-Jersey N. Co., (1 *Story's C. C. R.* 542,) and the Bank of Augusta *vs.* Earle, (13 *Pet.* 519,) show that such foreign corporations may be sued in other States by attachment, if their property is found there, though corporations have a local habitation where they are created. Such foreign corporations being sued in other States *in personam* may, by appearance, give jurisdiction, though they dwell in the respective States of their creation. (1 *Story's C. C. R.* 540.)

#### CITIZENS PARTIES TO NATIONAL ACTS.

SEC. 28. We have shown that it is one of the attributes of sovereignty that a nation represents the property and personal rights of its citizens. A nation is a sovereign body politic, vested, so far as other nations are concerned, with the persons and property of all its citizens, and bound to defend and protect them. Hence, every citizen is deemed a party to the treaties, laws and governmental acts of his own country, and these bind them, their rights and duties, in foreign as well as domestic transactions. This rule of public law is applied by judicial tribunals in all cases within their jurisdiction. (7 *How.* 39, 40, 42, 43.)

The States of our Union being municipal sovereignties, the same principles apply to their legal compacts and public governmental acts. (*Ib.*) The reason of the rule is, that each State is the trustee of its citizens for public

objects, and every citizen is deemed a party to the State act and bound by it.

POWER TO EXILE AND OUTLAW.

SEC. 29. There are, as we have shown, distinctions of political rights under the laws and Constitution of our Union between American citizens on the one hand, and aliens, Indians and colored persons on the other. We have shown that the Constitution, when it confers on the citizens of the several States reciprocally the rights and privileges of each, confers these political, property and personal rights upon the citizens of the States, and upon such persons as should thereafter be naturalized pursuant to an act of Congress or a treaty of the United States. Hence aliens, Indians and colored persons have inferior political rights to American citizens. It follows that the entry or residence of foreigners in the United States may be regulated by act of Congress, unless treaties otherwise provide. It also seems to follow that the migration of colored persons from State to State may be regulated by that body.

Both colored persons, individual Indians and aliens, as well as the citizens of other States, are subject to the laws of the State within whose territory they may dwell or happen to be, subject to the protecting provisions of the national Constitution and treaties.

The national government, having plenary authority over our foreign and inter-state relations, is vested with full power to admit, to exclude or to exile foreigners, if an act of Congress shall so prescribe. (2 *Story on Const.* 2d ed. §§ 1293, 1294, and n. 1, 2.)

No power of exiling an American citizen from the United States, or of excluding him from a return to our country, is known to our national Constitution or to American

law. Though Congress may pass extradition laws, in its discretion, to deliver up an American citizen, as well as aliens, for trial in foreign countries for crimes committed there, or on board the ships of such foreign nations on the high seas, no such power exists in any department of our government to exile an American citizen for any offence. For the national and State constitutions of our republic guarantee to every citizen his personal, property and political rights against diminution, except by due process of law, where he is duly served with process, and has an opportunity to appear and defend his rights.

SEC. 30. Although Congress has exclusive jurisdiction to enforce rights guaranteed by the national Constitution in certain cases, as those of masters over fugitive slaves, each State may pass laws to compel its citizens, and those within its territory, to respect there the rights of masters, and may punish them, civilly or criminally, for their violation, provided those laws are not in conflict with any paramount national law. It was so held by the Supreme Court of the United States. (14 *How.* 13.) Mr. Justice Grier, in giving the opinion of the court, declared that a State of our Union has authority to make such police laws for its own protection, and for the regulation of the conduct of its citizens and residents, and to punish criminally their violation, and that the same would be valid unless in conflict with an act of Congress or with the national Constitution. And, in the course of the opinion, the court approved of the laws of States excluding foreign paupers, criminals, free-colored persons and slaves from their respective territories under their police powers.

If the distinctions of our public law as to races seem singular, it must be recollected that they are founded on permanent differences of color, caste, condition and of mental qualities, made by the Creator, and fixed in the elementary constitution of the human family. We owe

this state of things to the law and colonial policy of Great Britain. We trust in God for our deliverance.

The same distinction of legal rights between the white and colored races is not peculiar to British or American law. It exists in the Spanish law. In Cuba, free negroes are not Spanish citizens, though the Spanish law allows slaves to purchase their freedom at a price fixed by three arbitrators, one named by the master and two by a designated public officer. (See *De Bow's Rev.* for Feb. 1853.)

When China and Japan shall send forth their swarming laborers to the United States and the West Indies, and supply the places of colored servants, and Liberia shall be prepared to receive the returning children of Africa, some new Moses may, perhaps, be raised up to lead them back to teach Christianity, civilization and free institutions to pagan Africa. Let no man presume to know the time and mode of this exodus, for God hath not yet revealed it.

#### RIGHTS OF AMERICAN CITIZENS IN FOREIGN COUNTRIES.

SEC. 31. As our constitutions and laws secure to foreigners in our republic freedom of worship, entire personal freedom and complete security of property, American citizens are entitled to the same rights and privileges in foreign countries upon the ground of national right as well as of reciprocity. This is obviously a just principle. President Pierce, in his excellent inaugural address, has plainly asserted this doctrine. The President said :

“ But the vast interests of commerce are common to all mankind, and the advantages of trade and international intercourse are common to all mankind, and must always present a noble field for the moral influence of a great people.

“ With these views, firmly and honestly carried out, we have a right to expect, and shall, under all circumstances, require prompt reciprocity. The rights which belong to

us as a nation are not alone to be regarded, but those which pertain to every citizen, in his individual capacity at home and abroad, must be sacredly maintained.

“So long as he can discern every star in its place upon that ensign without wealth to purchase for him preferment or title, or secure for him place—it will be his privilege, and must be his acknowledged right, to stand unabashed before princes, with a proud consciousness that he is himself one of a nation of sovereigns, and that he cannot, in legitimate pursuits, so far wander from home that the agent whom he shall leave behind, in the place which I now occupy, will see that no rude hands of power or tyrannical passion are laid upon him with impunity.

“He must realize that upon every sea and upon every soil where our enterprise may rightfully seek the protection of our flag, American citizenship is an inviolable panoply for the security of American rights.”

The President has thus happily expressed the common sentiment of the American people, and the entire nation will sustain him in giving to it practical effect.

#### COMITY AND THE GOSPEL.

SEC. 32. National comity is founded on the golden rule of the gospel, and by its benign principles an alien, in a foreign land, is entitled of right to civil and religious liberty ; to the right of buying, holding and using churches and places of burial ; to freedom of commerce, and of buying and selling upon the same terms as native citizens ; to the right of freely receiving letters, newspapers and books from their own and other countries, without any invasion of the privacy of the correspondence or any detention of it ; to an open and fair administration of law ; to courtesy, to hospitality, and to all things included within the celestial command : “Do unto others as you would they should do unto you.”



## RIGHTS OF DOMICIL.

SEC. 33. If aliens are domiciled abroad, and there engage in foreign commerce and domestic business, and the country of the domicil becomes belligerent, the other belligerent may, by the law of nations, capture or confiscate the property of such aliens, under the same circumstances that it would be lawful if they were native-born citizens of the place of their domicil. (1 *Wheat.* 54, 55, and n. f. 74, 168. *The Venus*, 8 *Cranch's R.* 253. *The Alexander*, *Ib.* 169. *The Rapid*, *Ib.* 155. 7 *Ib.* 506. 1 *Kent's Com.* 73—76.)

So, if a citizen or subject of a belligerent be domiciled in a neutral country, his domicil impresses a neutral character on his ships and cargoes on the high seas and in foreign ports. (*Ib.*) In *Livingston et al. vs. Maryland Ins. Co.*, (7 *Cranch*, 506,) Chief Justice Marshall affirms, that if an alien settle *bona fide* in a country, with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country, and this without reference to the trade he is engaged in, or whether he is engaged in any or not. The Chief Justice, in that case, also said, that "it is clear, by the law of nations, that the national character of a person, for commercial purposes, depends upon his domicil. But this must be carefully distinguished from the national character of his trade. For the party may be a belligerent subject, and yet in engaged in neutral trade; or he may be a neutral subject, and yet engaged in hostile trade."

At the commencement of the war between Great Britain and Russia, in 1854, Lord Clarendon set forth the views of his government in these words: "That by the law and practice of nations, a belligerent has a right to consider as enemies all persons who reside in a hostile country, or



who maintain commercial establishments therein, whether these people are by birth neutral, allies, or enemies or fellow-subjects; the property of such persons exported from such countries, is, therefore, *res hostium*, and, as such, lawful prize of war; such property will be considered as a prize, although its owner is a native-born subject of the captor's country, and although it may be in transition to that country; and its being laden on board a neutral ship will not protect the property."

A party domiciled in the country of one belligerent cannot, during the war, sue in the courts of the other. But a party may change his domicil and avoid the difficulties of the one he has left. (1 *Kent's Com.* 74. 2 *Gallis. R.* 102. 2 *Wheat.* 76. 1 *Gallis. R.* 614.) But, if a citizen, before his country goes to war, obtains a neutral domicil abroad, and returns to his own country and regains his native domicil, he cannot, during the war, again acquire a neutral domicil. (*Ib.*)

Thus, though a man and his property may be impressed with the character of the country of his domicil for certain purposes as to other nations, and subject his property there to ordinary and equitable taxation or appropriation for municipal purposes, it is clear, that while he does not become naturalized and put off allegiance to his native country, he remains her citizen or subject, and entitled to her protection against injustice from the government of such foreign domicil. But the above stated principles show in what cases the country of the domicil is to be looked to for protection. As to its foreign commerce, whether carried on by domiciled foreigners or citizens, it is the right and duty of a nation to protect it on the ground of self-defence.

RIGHT TO FREEDOM.

SEC. 34. Notwithstanding the preceding legal decisions, the great doctrine of our Declaration of Independence, that all men are born to an inherent, natural right to freedom, stands as an elementary principle of American law. A right to liberty is the general rule, and slavery and servitude are exceptions to it; local in their nature, and depending on the municipal law of the *lex loci*, they possess no extra-territorial rights or authority, except such as nations and States stipulate by treaty, by constitutional provision or by the *lex loci*, or such as they may allow or be bound to by international comity, or by the comity belonging to the private international law of the United States, or of other like confederations. (See *ante*, Ch. 7, and *Grotius*, b. 2, c. 15, § 1. Ch. 1, 2, 10. 1 *Phillimore on International Law*, 316, 385. 4 *Martin's Louis. R.* 385. 2 *Eden. Ch. R.* 126. The Somerset case, 2 *How. St. R.* 82. 2 *Barn. & Cress.* 428. 3 *Dowl. & Ryl.* 697. 2 *Marshall Kent. Ap. R.* 470, 472. 14 *Martin's R.* 401. 3 *Louisiana R.* 475. 4 *Missouri R.* 359. 4 *Pick. Mass. R.* 466. 10 *Leigh. R.* 615, 697. 16 *Pick.* 193. 16 *Pet.* 611.)

COLOR OF RACES AND THEIR CHARACTER.

SEC. 35. History and observation seem to prove that the most perfect physical and mental organization of man is found in the white race. The ancient Greeks, Macedonians, Hebrews, Phœnicians, Romans and Carthaginians, in arts and sciences, in war, in civilization and refinement, in power and in glory, far surpassed the shaded races of Nubia, Egypt, Africa, Chaldea, Assyria, Persia, Arabia, Hindostan, China, Japan and other shaded Asiatics.

The distinctions between the white race and the black and shaded races have existed for thirty centuries and upwards.

## DUTY AND POLICY OF EMANCIPATION.

SEC. 36. That the abstract natural right of every man of every race, white, red and black, of every shade, to personal freedom is one that is inherent and inalienable, and can be only justly forfeited by crime on due legal conviction, is an incontestible principle. The Roman dominion, covering one hundred and twenty millions of people, of whom about half were slaves of every color, in solidity of power far surpassed any nation of antiquity. War and slavery undermined this proud oligarchy, and it fell beneath the conquering arms of the fresh, bold and free white races of the north. The feudal system has been changed by the emancipation of the serfs in most of the European nations, and the sagacious and popular Russian Emperor, Alexander II., is now sweeping away serfdom and making all Russians freemen. The remains of this debasing system in another century will be annulled in Europe. As these serfs are of the white race in the main, the process in Europe is comparatively easy, and will add greatly to the industrial products and power of Russia, and of the States that follow her noble example.

In the United States and Brazil the duty of emancipation is the same, but it is very difficult to adopt a plan to effect it that will secure real benefit to the white and to the colored races. Immediate emancipation would injure both, and probably lead to the destruction of the black. The mode by which black slaves can be converted into industrious freemen has not yet been discovered by man, and is known only to the Creator. When a practical project shall be unfolded by the providence of God, we cannot doubt that Brazil and our slave States will do, what many States of our Union having few slaves have done, emancipate their slaves and rely wholly on free

labor. When or how such a result is to be attained is a mystery of Providence remaining to be solved.

Experience has taught us in the United States, that colored slaves, owing to being well fed, clothed, cared for and moderately worked, have multiplied rapidly, while free negroes and Indians, in contact with our white population, have vanished and passed away like the mists of the morning. We believe, with Washington and many eminent philanthropists and statesmen, that the time will come when American slavery will cease; but, though we see the beautiful bow of God's promise afar, the cloudy, fiery pillar that is to lead forth to liberty the slave and the captive, is beyond our horizon. When and how this grand exodus is to be accomplished, is known only to our Father in Heaven.

## COLORED IMMIGRATION.

SEC. 37. African slavery in America is said to have been devised by Bartholomew de Las Casas, Spanish Bishop of Chiapa, to substitute African for Indian labor in the mines of America, to save the Indians from extermination from their inability to endure such labor. His object was a humane one, as viewed by him. (*Benton's Ab. Deb. in Cong.* vol. 7, p. 123.) But the United States and the several States have long since adopted the policy of arresting the slave trade, and diminishing the colored and shaded races within their respective limits; but by act of Congress, from and after January 1st, 1808, it was made unlawful "to import, or bring into the United States, or the territories thereof, from any foreign kingdom, place or country, any negro, mulatto or person of color, with intent to hold, sell or dispose of such negro, mulatto or person of color, as a slave, or to be held to service or labor." By our acts of Congress no coolie, shaded or colored person,

Asiatic, Chinese, Hindoo or Japanese, can be imported into the United States either as apprentices or slaves. Indeed, these are but forms of the slave trade.

Even the migration from abroad of these races into any State, may be prohibited by State laws for police reasons. The same power that enables a State to prohibit immigration of slaves, or free-colored or shaded persons from other States of our Union, may lawfully exclude all colored and shaded races from foreign countries from entering and locating within a State, if not specially authorized by act of Congress. A vicious, pagan population, like the Chinese, Hindoos, Japanese and other Asiatics, may be excluded from a State, as a wise police regulation, to protect the community from contamination, and rests on its police powers. On this ground California passed laws to exclude the Chinese after a fixed day.

#### IDENTITY OF THE HUMAN RACE.

SEC. 38. The celebrated Humboldt, in his *Cosmos*, the learned and able Cuvier, the German naturalist, Müller, St. Paul, and the great naturalist and geologist, Hugh Miller, declare themselves in favor of the unity of the human race. It is the common sentiment of mankind. Miller, in his "Testimony of the Rocks," (Am. ed. 265,) gives his views at length. He affirms that Adam and Eve were of the highest Caucasian models of beauty, and that from this pair all races of men are descended. He accounts for the colored races and the different lower species of men by supposing that, in a very remote antiquity, their originals were self-degraded individuals, from whom the inferior races came.

## CHAPTER VIII.

### PRESIDENTS, SOVEREIGNS, NATIONAL EXECUTIVES, FOREIGN MINISTERS, CONSULS, &C.

SEC. 1. A president, sovereign or other national executive, allowed expressly or impliedly to enter a foreign country, is exempt, by the law of nations, from the *lex loci* of the country visited. (2 *Phillimore on Int. L. m.* pp. 264, 265, 575, 582. *Wheat. Int. L. P.* 2, c. 2, § 9.) This is a principle of national comity which has grown out of modern civilization and Christianity, and which was unknown to the inferior legal refinement of ancient nations. One of the most unworthy and barbarous violations of this benign rule of public law among Christian nations in modern times was the arrest of Richard, the lion-hearted king of England, on his return from the Holy Land, by a German sovereign. A ransom was demanded for the noble captive. Such acts belong to a semi-barbarous age, and are now condemned by public law.

As the privilege of a public minister is on account of his public character, he cannot waive it. (*Ib.*) Nor can any suit be brought against a foreign president or king, for any thing done in his public character, in any court. (2 *Phillimore on Int. L. m.* pp. 567, 568, 575, 591—593.)

A foreign sovereign may sue in the courts of law and equity of a foreign country; and, when he commences a suit in equity, a cross-bill may be filed against him, and by his agent he will be obliged to put in an answer, like an ordinary suitor, that all the facts in the case may be

brought before the court, and justice be done to all parties. (*Ib.* pp. 551—553, 565—567.) So, if a foreign minister sues in a foreign court, he becomes liable to set-offs, ordinary defences and costs, like other defendants. (*Ib.* 195.)

In case an ambassador becomes a trader or merchant in the country where he is accredited, his property employed in trade and its profits are liable to seizure and sale, like that of any other debtor, at the suit of creditors of the trading concern. (*Ib.* 193, 194.) For, as to such movables, they belong to ordinary commerce. If a minister is a trustee, his privilege does not cover the trust fund. (*Ib.*)

Ambassadors and all foreigners may be restrained from doing civil or criminal injury in person, by their property or otherwise, to the person or property of others in the country to which they are sent; (*Ib.* 195, 196;) with these exceptions a minister, his wife and family and suite, or *comites* and couriers, are entitled to inviolability, and none of them can waive this privilege, as it is a national privilege accorded by all Christian nations. (*Ib.* 196, 197.)

All members of the *corps diplomatique* are allowed to introduce their movables into a country duty-free, but this does not cover merchandise introduced for sale.

SEC. 2. Every independent nation, as an attribute of sovereignty, by the comity of nations, has the right to send and to receive public ministers. (*Wheat. Int. L. P.* 3, c. 1, §§ 1—7.) The mode of their appointment depends on the organic law of each nation. Dependent States, whose national relations are controlled by a sovereignty, cannot send public ministers. This is the case with the States of our Union. (*Ib.* 14 *Pet.* 571, 572, 588.)

In cases of revolution, a government *de facto*, once

recognised, may send ambassadors and ministers, and receive them.

The obligation to receive public ministers is imperfect, it is said, that is, it is not an enforceable national duty, according to Wheaton and other civilians. Hence, they say, a nation may receive one of its own subjects as a foreign minister on condition of his remaining subject to the *lex loci*; or may refuse to receive a particular foreign minister on assigning reasons for the refusal. (*Ib.* § 5.) With all due deference, it appears to us that national comity requires that any public minister of a foreign nation ought to be received, unless he is a citizen of the State to which he is sent, and then the refusal ought to be placed on the ground of the incompatibility of the duties of a foreign minister with those of citizenship.

To refuse to receive a foreign minister is an unfriendly act, and though nations may do so, or may dismiss an ambassador for gross disrespect or misconduct, or may demand his recall, such proceeding, though not a cause of war, disturbs the harmony of States, and ought to be avoided as an unfriendly act. (7 *Hamilton's W.* 669.)

The duty to maintain peace makes negotiation and all pacific modes of redress imperative, including the appointment of ministers. (*Vattel*, B. 2, c. 18, §§ 323—346.)

SEC. 3. The Congress of Vienna, of 1815, divided public ministers into three classes:

1. Ambassadors, legates or nuncios.
2. Envoys, ministers, or others accredited near sovereigns or executives.
3. *Chargés d'affaires* accredited to the minister of foreign affairs.

As to the questions of comparative rank and dignity of these representatives, it is a matter of little interest, and we leave that subject to other writers. The refined



etiquette of courts must soon give way to the simplicity of republican example.

SEC. 4. Ambassadors and other public ministers, with their wives, families, secretaries, attachees, domestics and couriers, and bearers of despatches, with all their effects, as well as the minister's house, are exempt from the action of the *lex loci* of the countries where they are accredited. The mansions of these privileged representatives of nations, and their effects, as well as goods or property imported for their use, are free from taxation and import duties. (*Vattel*, B. 4, c. 95, §§ 117—125. 11 *Wheat.* 467. 1 *U. S. St. L.* 117, 118, n. a. *Wheat. Int. L. P.* 3, c. 1, §§ 1—12.) A minister is entitled to freedom of worship in his own chapel. (*Ib.* § 19.)

This exemption does not apply to property employed by the minister in commerce; or to such as is not connected with his official functions, or appurtenant to his family. (*Vattel*, B. 4, c. 8, § 114.)

Foreign ministers are deemed by national comity to dwell *quasi* in their own country; and their children born abroad are considered as natives of their own country.

A minister is entitled to his own chapel and worship; and the *lex loci* does not apply to it or regulate it.

Public ministers, though they cannot be sued or impleaded, civilly or criminally, in the country where they are accredited, may sue in its courts. (*Wheat. Int. L. P.* 3, c. 1, § 15.) They may bring civil suits, but in cases of insult or crime, the minister should complain to the sovereign or executive of the country where he is accredited. (*Vattel*, B. 4, c. 8, § 111.) It is the duty of such sovereign or executive to see that suitable redress is made and appropriate punishment inflicted upon the offender.

If public ministers interfere with the domestic government of the country to which they are sent, or treat the government with disrespect, or violate its laws, or com-

mit offences against its peace or neutrality, the injured nation may demand the recall of the minister, or may terminate all intercourse with him, or give him his passports, or personally restrain him from acts of violence, if need be; or expel him the country. The mildest course should be taken that will effectually protect the injured State and its dignity. A few years ago Spain dismissed a British minister, and our republic dismissed Genet, the minister of the French republic, and Mr. Crampton, British minister, the British Consul-General and other consuls, for violation of our neutrality laws. But the dismissals were accompanied by pacific and appropriate explanations, and command the public approbation.

SEC. 5. Local laws or treaties may confer on consuls the immunities of public ministers, but, by the general law of nations, they are not entitled to them. Independently of treaties they are subject to the *lex loci*, like other resident foreigners, owing a temporary allegiance to the nation. (*Wheat. Int. L. P.* 3, c. 1, § 22.)

In our republic, the exclusive jurisdiction is given to the national courts in criminal prosecutions and in civil suits commenced against them, to ensure their protection. (*Const. U. S.* art. 3, § 2. 6 *Pet.* 41. 7 *Ib.* 276. 1 *U. S. St. L.* 77, § 9; p. 80, § 13.)

It is said no State is bound to receive a consul unless bound to do so by treaty. But Wheaton and the old civilians lay down this rule upon precedents that may well be held obsolete, and not binding on this age of civilization.

As nations are bound together as one great family, though a nation cannot be constrained to receive consuls, a refusal to receive them would be deemed an unfriendly act. No such refusal can be expected at this day from any maritime nation, except semi-civilized States.

Though a consul has not the immunities of a foreign minister, if a mob, exasperated against his government, destroy his property and his official records, it is a national injury, for which redress ought to be made by the nation where he resides. So Mr. Secretary Webster decided in the case of the Spanish consul at New-Orleans.

SEC. 6. In the United States, the Constitution and laws provide judicial protection for public ministers and consuls, by giving the national courts jurisdiction in suits and proceedings against consuls, and providing for the safety of ministers and other privileged persons.

By the first and second sections of article third of the Constitution of the Union it is declared, that the judicial power of the courts of the Union shall extend to all cases affecting ambassadors, other public ministers and consuls; and that the Supreme Court shall have original jurisdiction. The ninth and thirteenth sections of the act of Congress to establish the judicial courts of the United States, (1 *U. S. St. L.* 77, § 9, p. 80, § 13,) confer on the district and circuit courts jurisdiction in all cases affecting consuls and ambassadors and their servants, so far only, however, as a court of law can exercise it consistently with the law of nations. (11 *Wheat.* 467, 473. 6 *Pet.* 41. 7 *Ib.* 276.)

In *United States vs. Ortega*, in a note, (11 *Wheat.* 473,) the learned Wheaton lays down our law on this subject, in these propositions, to wit: It results from the above provisions of the Constitution and acts of Congress and the judicial expositions that have been given to them—

1. That no civil suit or criminal prosecution can be commenced against a foreign ambassador, other public minister or consul in any State court.

2. That such ambassador, public minister or consul may, at his election, commence a suit in a State court (in

other respects of competent jurisdiction) against any individual.

3. That an ambassador or other public minister cannot be proceeded against by compulsory process, in any court whatever.

4. That a consul may be sued or proceeded against, civilly or criminally, in the courts of the Union, in the same manner as a private individual.

5. That in civil suits against a consul, and in prosecutions against him, within the limits of the criminal jurisdiction of the district courts, such courts have jurisdiction of such suits or prosecutions.

6. That in criminal prosecutions against consuls for offences above the description of those cognizable in district courts, the circuit courts have exclusive jurisdiction, and concurrent jurisdiction with the district courts in the other cases cognizable therein.

7. That the Supreme Court has original and exclusive jurisdiction of such suits or prosecutions against ambassadors and other public ministers as any court of justice can exercise consistently with the law of nations.

8. That the Supreme Court has original, but not exclusive, jurisdiction of suits brought by ambassadors or other public ministers, or in which a consul is a party.

9. That the Supreme Court has appellate jurisdiction of all cases in which a minister or consul is a party, arising in the State courts, and involving the construction of the national Constitution, or the validity and construction of the laws and treaties of the Union, under the restrictions mentioned in the twenty-fifth section of the Judiciary Act of 1789, c. 20. (1 *U. S. St. L.* 85.)

10. That the Supreme Court has appellate jurisdiction of all civil suits brought in the courts of the Union, having original jurisdiction of the suit, where a minister or consul is a party, and the matter in dispute exceeds the

sum of two thousand dollars. (See 1 *U. S. St. L.* 84, § 22.)

In *Valinero vs. Thompson*, (3 *Selden's R.* 576,) it was held by the Court of Appeals of New-York, that a foreign consul could not be sued in a State court, and that this was a privilege of his government, and could not be waived by his appearing and pleading to the merits.

Ambassadors and ministers cannot be obliged to attend as witnesses, to testify in civil or criminal cases, by compulsory process, as they represent their sovereign when in foreign territory. On this ground the minister of the Netherlands refused to be examined as a witness in the case of Herbert, charged with murdering a waiter in the presence of the minister.

#### CONSULAR POWERS AND DUTIES.

SEC. 7. A consul of a nation, received and recognised in a foreign State, is a public commercial agent of his own country, and may, without special authority, institute legal proceedings *in rem* to protect the rights of his fellow-citizens; but before actual restitution can be awarded, he must have a special authority from the parties interested. (3 *Wheat.* 445, 446. 6 *Ib.* 167—169. 10 *Ib.* 66.)

But a consul cannot exercise any functions of a minister or diplomatic agent unless such powers are specially conferred upon him. (3 *Ib.* 445, 446.)

SEC. 8. A consul or minister in a foreign country can exercise no judicial power, unless authorized by treaty and the laws of his own country. (*Wheat. Int. L. P.* 2, c. 2, §§ 11—13. 6 *Wheat. R.* 156.) See, also, 9 *U. S. St. L.* 276, 280, 302, for the act of Congress to carry into effect our treaties with China and the Ottoman Porte,

giving certain legal jurisdiction to American consuls, and exempting Americans from the local tribunals.

As to regulation of extradition, see 9 *Ib.* 302. 8 *Ib.* 576, 582. 10 *Ib.* 905, and *Brightley's Dig. L. U. S.* 269. These will show what legal action may be taken by American ministers and consuls in such cases.

#### EXTRA-TERRITORIAL JURISDICTIONS IN CHINA AND THE OTTOMAN EMPIRE.

SEC. 9. Congress, on the 11th of August, 1848, (9 *U. S. St. L.* 276,) passed an act to vest our commissioner and consuls in China, and our minister and consuls in the Ottoman empire, with judicial power, to the extent authorized by our treaties with those powers. The act extends the laws of the United States, and jurisdiction in civil and criminal cases, over all citizens of the United States in China, and over all other persons, so far as the treaties allow or require; and where such laws are not applicable or are deficient, the common law is extended over such American citizens and others; and in every case, where neither the laws of the United States or the common law furnish suitable remedies, the commissioner or minister is empowered to supply the deficiencies by decrees and regulations that shall have the force of law.

By act of September 20, 1850, (*Ib.* 468,) Macao is excluded from the operation of the first act.

SEC. 10. An ambassador, minister or consul may, in journeying, find it convenient to pass through other nations than those where their public duties are to be performed, or to send their official despatches and to receive those of their governments by the mails of friendly States. All friendly powers are bound by comity to give entire immunity and free passage to such officials and despatches, subject to the treaty or usual postages and charges. Any

refusal of this right to such officers would be an indignity to the nation whose official persons or despatches were interfered with. The practices of European States, in violation of this principle, cannot be too severely censured. In 1854, Mr. Soulé, American Minister to Spain, travelled through France to England, and on his return to Spain, *via* Paris, he landed in France, and the French police, by order of the government, refused to permit him to enter France, and compelled him to return to England. Whereupon Mr. Mason, our Minister to France, demanded from the government an apology for the insult and a reparation of the wrong, and they were made. Mr. Soulé was invited to pass through France, and the *amende honorable* was made, or probably our spirited minister would instantly have closed his mission. Nations, as well as individuals, may, and ought at once, to resent any insult or want of comity from any foreign nation, even to its citizens, but especially to its ministers and consuls.

SEC. 11. A nation may refuse to receive a minister, and of course a consul, if not agreeable, and request the appointment of another in his stead. The right to refuse to receive or to dismiss a foreign minister or consul is constantly exercised by nations. (*Lyman's Diplomacy of U. S.* §§ 310, 311, and n. *Martens' L. of N.* Lond. ed. 1829, 213, 214.) Martens says, that the appointment of ministers appertains to each sovereign nation; leaving the right of reception in the nation to which he is sent; and that a nation may refuse to receive a minister it dislikes, or who is inadmissible by the laws and usages of the country. (*Ib.*)

It is clear that comity and courtesy forbid that objections should be made to a foreign minister unless there is some well-grounded charge against him, or he has been used before by his country on some highly objectionable service. Our republic refused to receive a British minis-

ter, who had demanded in time of peace of Denmark the delivery to him of the entire fleet of that country, on the plea that Napoleon would otherwise seize it and use it in the war with Great Britain. And for the refusal the British minister gave orders to bombard Copenhagen, and fifteen hundred Danes were killed and the city greatly injured. Considering this atrocious outrage and the slaughter of the Danes, our republic took a very proper mode of expressing their detestation of this British atrocity and of its minister.

## IMMUNITIES OF PRESIDENTS, SOVEREIGNS, &amp;c.

SEC. 12. In *Charles, Duke of Brunswick vs. King of Hanover*, (6 *Bevan*, 56,) it was held by the Master of the Rolls in the English Chancery, that a foreign sovereign in England is inviolable, and he cannot be sued there, and that the inviolability of foreign sovereigns attends them everywhere, and that they are not liable to be sued on account of any matter of State, or to enforce any private right against them.

In this case it was also held, that sovereigns might be made defendants to enable them to assert their rights in their public character. It was also held, that where a foreign sovereign filed a bill in a court of chancery to enforce any right, a cross-bill might be allowed to be filed against him for the attainment of justice in the case.

The President of the United States, or any other supreme executive, is entitled to the same rights and subject to the same restrictions. (See 2 *Phill. Int. L.* 41, 193—195, 551—567.)

Any such executive in a foreign country may, however, be restrained from criminal acts in violation of the public peace, and may, for sufficient cause, be ordered out of any foreign country, and even be forcibly removed there-



from, if his conduct requires it. (*Vattel*, B. 4, c. 7, §§ 94—100.)

Ambassadors and ministers, as representatives of national sovereignty, are entitled to freedom from local jurisdictions on the same principle as the sovereign or president. (*Ib.*)

In *Holbrook vs. Henderson*, (4 *Sandf. S. C. R.* 629—631,) it was held that a foreign minister, passing through a friendly nation to which he is not accredited, on his way to or from the government to which he was appointed minister, is entitled to the same exemption from arrest as a resident minister. The distinguished Justice Oakley, after reviewing the conflicting opinions on this point, prefers, with good reason, that of *Vattel*, and assigns the most solid grounds for this doctrine. By comity of nations sovereigns, executives and their ministers ought to be exempt from service of process in foreign countries, and to enjoy the immunities accorded to ambassadors by Christian States. *Vattel*, with much good sense, insists that a sovereign in a foreign country, as a traveller, and his minister passing through a country, though he is appointed minister to another, are, by national courtesy, exempt from the local jurisdiction. (*Vattel*, B. 4, c. 7, § 108.)

## CHAPTER IX.

### THE GOSPEL—THE BASIS OF INTERNATIONAL AND MUNICIPAL LAW. PACIFIC RIGHTS AND DUTIES.

SEC. 1. The principles of the Gospel are now the acknowledged foundation of international and municipal law. Near half a century ago, the compact of the Holy Alliance, generally assented to by the royal rulers of the Christian nations of Europe, including the Pope, declared this doctrine to the world in the name of the Holy Trinity. This solemn avowal precludes further discussion as to the basis of the law of nations and of municipal law. This gives to all nations the rule of international right and duty.

SEC. 2. By this standard the citizens of every government are entitled to the following international rights: to freedom of commerce and correspondence, to civil and religious liberty, to hospitality, to a fair, public and impartial administration of justice, to exemption from arbitrary police action, to easy admission into and passage through foreign countries without unreasonable charges and hindrances, to the right of domicil and trade abroad, to have churches and schools for public worship and education, and places of burial, to have security of person and property in foreign countries, to enjoy the right of withdrawal of person and property at will, first paying all local debts, and without unreasonable charge or tax. In short, all foreigners in other countries are entitled to all the privileges and inherent, inalienable rights of men

that are secured to American citizens and to aliens in our republic, for these are the natural appurtenances of free humanity.

In the United States and the States of our Union, the constitutions and laws protect all citizens and aliens in the full enjoyment of the rights of freemen, in accordance with the precepts of the Gospel. Our republic and every nation has a right to claim these privileges in foreign countries for their citizens, domiciled there or temporarily dwelling abroad. The compact of the Holy Alliance sanctions this doctrine, and by implication condemns those despotic nations who violate the rights of aliens as above explained.

The time has arrived when despotism, with its oppressions, must give place to the precepts of the Gospel, enjoining freedom and equality. The Gospel is the celestial *magna charta* of the liberties of the whole world.

SEC. 3. The golden rule of the Gospel, "Do as you would that others should do unto you," prescribes the duties of nations, and, fairly applied, readily solves every international question of right and duty.

SEC. 4. Nations and States ought to assert their rights and perform their duties according to that divine rule.

SEC. 5. They are bound to live peaceably and to deal justly with each other, and to employ, in all international transactions, the golden rule, as the measure of international right and obligation.

Neutral nations are bound to pass laws to prevent their citizens, ports, territory or curtilage being engaged or employed by either belligerent against the other. Our republic has performed this duty. (3 *U. S. St. L.* 447. 6 *Wheat.* 169, 171. 3 *Dall.* 153, 164. 3 *Kent's Com.* 5th ed. 100.)

SEC. 6. All belligerent captures made within the territory or maritime curtilage of a neutral nation are illegal,

and they may be so declared and treated by the laws and tribunals of the nation whose jurisdiction has been violated. The courts of the latter may decree restitution of the property captured, if it is brought within their power and jurisdiction. (1 *U. S. St. L.* 384—386. The *Fanny*, 9 *Wheat.* 658. The *Estrella*, 4 *Ib.* 298. The *Gran Para*, 7 *Ib.* 471. 6 *Pet.* 445.) All courts of admiralty have power to award restitution in these cases. (*Wheat. L. N.* 467.) The *Bello Corrunnes*, 6 *Wheat.* 169, 172.)

As illegal capture is void, it would seem that the owner might sue for redress before any court of any country having jurisdiction of the vessel or parties.

SEC. 7. Belligerent captures, by neutrals receiving commissions as cruisers, under a formal naturalization, for the sole purpose of plundering one of the belligerents by authority of the other, are illegal and unprincipled; and such commissions of such base neutrals, whose acts savor strongly of piracy, are contrary to the law of nations; and all such captures ought to be held absolutely void, and all neutral nations are bound to suppress them as far as possible. (*Vattel*, B. 2, c. 18, § 348. 6 *Wheat.* 169, 171. 3 *Dall.* 133, 153, 164. *Act of Cong. March 3, 1847.* 1 *Kent's Com.* 5th ed. 100.) The act of Congress, passed to provide punishment of piracy in certain cases, declared such capture by neutrals, under such pretended commissions, to be piracy, and punishable as such, in all cases where the foreigners making captures of American property belonged to nations with which our republic has treaties declaring the same piracy. The celebrated De Witt, a civilian of Holland, asserted these doctrines.

SEC. 8. In case the armed ships or officers of one foreign nation unjustly seize the property of citizens of another nation, or if private persons seize such foreign property and take it to their own country, and the tribunals of the

latter refuse to redress the wrongs and afford full satisfaction, as they would do if native citizens sued in their courts, or if a nation owes a foreign nation, and omits or refuses to pay its debts, in all these cases, after demand of satisfaction by the injured nation, it is just and lawful for the wronged nation to issue letters of marque and reprisal, and to take within its ports and curtilage, or on the high seas, so much of the property of the citizens of the offending nation as will satisfy the just claims of the seizing nation, together with the expenses of seizure. The property so taken, or its proceeds, however, ought to be held as a pledge for a reasonable time; and the seizing nation ought to offer to arrange the controversy by negotiation, if possible. If that fails, arbitrament by civilians ought to be proposed. In a national point of view, all the property of a nation is a fund to pay a just claim of a foreign State, and letters of marque and reprisal are a kind of equitable execution for the levy of a debt due to a foreign nation. It places the parties on a fair footing to negotiate and compromise, and makes the offending nation debtor to its own citizens so far as the property of private persons is thus taken for public use.

By the civil law, from the time of Cicero, and by the common law of England, it has been held a principle of natural equity, that whenever, by a legal proceeding, one man's property is taken to pay the debts of another, the latter becomes, *pro tanto*, the debtor of the former, whose property has been thus applied to the other's debt. (8 *Term R.* 308. 4 *Hill's N. Y. R.* 345.) Grotius affirms this doctrine and so does Vattel. (*Vattel*, B. 2, c. 18, §§ 344, 345, 347.) The principle of national law making a State debtor to its citizens, whose property has been taken by letters of marque and reprisal, or otherwise, for a State or national liability, is clear and undeniable. It is fortified by the consideration, that national losses ought to

be equalized; and hence, all national charges ought to fall on the national treasury.

SEC. 9. As all nations are bound to preserve peace as far as possible, as a means thereto they ought to demand satisfaction for any and every serious national injury before proceeding to war, the *ultima ratio* of nations. If negotiation fail, and a fair mediator offers to settle the difficulty, the mediation ought to be accepted. If such mediation is not offered, then arbitrament, by able and independent civilians, ought to be agreed on in all practicable cases. (*Life and Writings of De Witt Clinton*, pp. 273—281. *Vattel*, B. 2, c. 18, §§ 323—330. *Spark's Life of Franklin*, vol. 8, p. 417.) Such arbitrament was properly offered by Great Britain in our negotiation with her for the settlement of the Oregon boundary. The offer ought to have been accepted by our government, if negotiation had finally failed. But the wise and just arrangement of the conflicting claims in Oregon rendered a resort to arbitrament unnecessary. This British offer of arbitrament proceeded from that splendid statesman, Sir Robert Peel, and marks a new era in civilization. Our treaty of peace with Mexico has an article based on this pacific principle. There are extreme cases of national wrong where a peremptory demand of instant redress by the injured State ought to be made and enforced by the *ultima ratio* of nations, if satisfaction is denied. There are cases of direct and palpable invasion of the territory, or its appurtenant rights, ships or sovereignty of a nation by an aggressive State. But, even in these cases, the peremptory demand of redress ought to assume the mildest form consistent with a firm demand of instant reparation. In such cases there is nothing to debate and nothing to submit.

SEC. 10. Every nation ought to compel its own citizens to abstain from belligerent acts against peaceful nations,

and to compel belligerents to respect its territory, curtilage, &c. (3 *U. S. St. L.* 447. 1 *Ib.* 381—384.)

The territory of a neutral cannot be used for any military or naval object, by either belligerent, without the consent of the neutral, and its consent, in aid of one belligerent against the other, would destroy its neutrality.

A neutral port and country within a marine league from its shores, and to the extent of its maritime curtilage, protects not only neutral property, but, within those limits, acts of actual or incipient aggression cannot there be lawfully committed by either belligerent upon an enemy's ship; and hence, when two belligerent ships-of-war are within such neutral jurisdiction, neither can molest the other; and if one puts to sea, the other must wait in port twenty-four hours before sailing. (*Chitty's L. N.* 113, 114. *Prof. Martens' W.* 8. 1 *Molloy*, b. 1, c. 3, § 7; c. 1, § 16.)

And every neutral nation is bound to compel obedience to these rules of public law, and is responsible to the nation injured by any failure of a neutral to exert its military and naval power to coerce respect for its sovereignty and neutrality.

No neutral nation can open its territory, rail-roads and roads to one belligerent, to facilitate the concentration of his army and his attack of his enemy, without forfeiting the position and privilege of a neutral. Bavaria, in the war of 1859, by such acts in favor of Austria, became an Austrian ally, and of consequence an enemy of the French and Sardinians.

The distinguished civilian and statesman, Alexander Hamilton, as a member of the cabinet of Washington, gave his opinion that the arming of privateers in our ports by Genet, the French Minister, with French commissions, to cruise against the vessels of Great Britain, then at peace with our republic, and bringing their prizes

into our ports, without our consent, was a violation of the sovereignty of the United States, and that our republic was bound to restore the property to the British owners, or make reparation, on demand of their government. He based this opinion on the ground that the jurisdiction of the United States, within its territories, excluded all foreign authority, except so far as treaty stipulations allowed its exercise; and that the proceedings of the French Minister were an insult to our republic, and that the duties of neutrality, and the obligation to treat the belligerents alike, bound our government to prevent their territory and curtilage from being made a field of hostility by either party to the war. (*Hamilton's W.* vol. 4, pp. 394—401.)

In defending the course of the American government against the published attacks of the French Minister, Hamilton affirmed, in able articles, that every nation had a right to claim jurisdiction on its coasts to the extent of the range of a cannon shot, and that many nations claimed further into the sea. He held, that within that curtilage all belligerent captures were null and void, as made in violation of the neutral jurisdiction. That every nation had the right, and it was its duty, to prevent the making of captures within its territory or its curtilage of the persons and property of any nation with which it was at peace; and that it was bound to use its public force to prevent such illegal captures, and to cause them to be restored, or to make satisfaction to the injured nation. (*Ib.* and vol. 7, pp. 125, 126, 129, 134, 135, 136, 602.) So Washington's cabinet held, (4 *Ib.* 467, 468.)

All captures effected by a belligerent within the territory or curtilage of a neutral, or by its use, though the actual taking is without it, are illegal and void. (*Ib.*) Wheaton lays down this rule.

Hamilton maintained that, if reparation is demanded



and refused, the injured nation may make reprisals, or may accept of damages, at its option. (7 *Ham. W.* p. 135; vol. 4, p. 399.) At page 126, he insisted that the practice of nations accorded with his principles of public law above declared, and referred to *Vattel*, B. 2, §§ 84, 101, 289, and to other publicists for the assertion. And he added: "A neutral fortress never scruples to fire upon the vessels of any power which attempts to commit a hostility against another power within reach of its cannon, nor a neutral sovereign or magistrate to prevent or restore captures made within its jurisdiction." (p. 126.)

He declared that a nation that allowed a belligerent to commit acts of hostility within its jurisdiction became party to the war, in effect, and he cited *Vattel* and other writers on public law to that position. (Vol. 7, pp. 134, 135.) Nor, said he, can aid and asylum be allowed to one belligerent without violation of the law of nations, and losing a neutral position. He quoted the marine ordinances of France, founded on this doctrine, that "no vessel, taken by a captain having a foreign commission, can remain more than twenty-four hours in the ports or harbors of France, if not detained there by tempest, or if the prize has not been made of the enemies of France." He also relies on *Valin*, who says: "Plenary asylum is due only to those with whom we are not at war. To enemies we owe no more than the safety of their lives; to others we owe hospitality and good treatment, with liberty to go away when they judge proper.

"Nevertheless, as neutrality with two powers at war permits not to succor one to the prejudice of the other, to conciliate this consideration with the right of asylum, nations have tacitly agreed, and usage has made it a common law, that asylum shall be granted to foreign armed vessels with their prizes; that is to say, if they entered into a port through tempest, as long as the bad weather shall

not permit them to put to sea, and for four-and-twenty hours only, if they shall have put in from any other cause.

“Thus, except the case of tempest, vessels being in a condition to make sail, there is an obligation to make them depart and return to sea after twenty-four hours, whatever danger there may be of recapture by their enemies; otherwise it would be to violate the laws of neutrality.” (See *Vattel*, B. 3, c. 7, § 104, and other authorities cited by Hamilton, vol. 7, p. 135.)

Independent of treaty stipulations, Hamilton deemed that the right of a belligerent captor to sell its prizes in the port of a neutral was very doubtful, and he referred to *Vattel*, B. 3, c. 7, § 232. (7 *Ham. W.* pp. 136, 137.)

Hamilton (7 *Ib.* p. 137) expressed the opinion that the allowing a belligerent to enter neutral ports and sell its prizes would be inconsistent with neutrality, and would inevitably make such *quasi* neutral nation a party to the war.

Under the violent and unlawful counsels of Genet, the French Minister, French privateers were not only organized, manned and fitted out at Charleston, South Carolina, but their prizes were brought into that port, and the French Consul there proceeded to try, condemn and sell them, a proceeding unwarranted by usage, by treaty, by precedent or by permission of our republic. (7 *Ib.* p. 138.)

The consuls of France not only illegally set up a French admiralty prize court in the United States, without their consent, in violation of their sovereignty, but one of them had the audacity, by protest “to the District Court of New-York, not only to deny its jurisdiction, but to arrogate to himself a complete and exclusive jurisdiction over the case.” (*Ib.* p. 139.) These acts were direct insults to our republic, and the decrees of these

French courts, so held, must, on principle, have been void for want of jurisdiction.

President Washington, for these and other like acts, demanded the recall of Genet. He was recalled by his government, and our republic adhered to the wise neutrality of Washington.

SEC. 11. Congresses of nations to improve the law of nations are of high utility. The Congress of Panama, projected by President Adams and Henry Clay, Secretary of State, and the benign principles of public law they aimed to establish, entitle these eminent statesmen and patriots to eternal honor. (*Am. Ann. Reg.* P. 2, for 1827, pp. 29, 36.) The Congress of Paris, of 1856, deserves the world's applause for finally decreeing the freedom of the seas and of great navigable rivers, as well as religious liberty to Turkey. By that act all the great powers of Europe stand pledged to freedom in religion.

SEC. 12. The invention by Morse of the telegraph, the improvements in the printing press, in the geography of the seas by Maury, and other forward movements in the arts and sciences in Europe and America, and the cosmopolitan character now freely given to eminent discoverers and inventors by all Christian nations, show us that the printing press, the railway and the telegraph are rapidly advancing the Christianization and civilization of the world. The noble reward conferred by several European nations, at the suggestion of Napoleon III., on Professor Morse, for the discovery and practical perfection of the telegraph, is honorable to the royal donors, to the great inventor and to our republic. Such princely acts tend to peace on earth and good will among men.

SEC. 13. All pacific rights and duties, not above explained, may be resolved by reference to the precepts of the Gospel, the acknowledged basis of international and municipal law.

## CHAPTER X.

### MARITIME RIGHTS OF NATIONS.

SEC. 1. The nature of oceans and seas, overspreading three-fourths of our globe and connected by straits as affectionate navigable bonds of union, makes them a common domain of the whole family of nations. In their vastness, in the irresistible power of their stormy waves, defying man's control, and wrecking and entombing in wild merriment the proudest navies, with their navigators and occupants, in the inability of man to erect upon the high seas a single sign of his dominion, all these attest that the Most High has made them incapable of conquest and appropriation, and for the common use forever of all mankind. The inspired Psalmist beheld Jehovah, the Lord of the seas, and in view of his terrible Majesty, exclaimed: "Thou rulest the raging of the sea." Jesus Christ said to the waves, "Peace, be still," and they obeyed him.

The high seas are the great common field of God's beneficence to the inhabitants of the world, as well as of his power. They are filled with inexhaustible quantities of food and other things for man's use. This great storehouse, covering all but one-fourth of the earth, can neither be conquered, nor its contents, to any appreciable extent, be appropriated by any nation to the injury of the rest of the human family. Its great extent offers its rich supply to all nations. It also opens a free common navigation, and free common fishery and use, by the aid of the winds, the waves and the currents, to every people, and makes the oceans, seas and connecting straits forever

free. They are God's gift to all, free as light and air. Freedom of the seas is impressed on them by the Creator. A great poet hath well said:

“Roll on, thou deep and dark blue ocean—roll!  
 Ten thousand fleets sweep over thee in vain;  
 Man marks the earth with ruin—*HIS control*  
*Stops with the shore*;—upon the wat'ry plain  
 The wrecks are all thy deed, nor doth remain  
 A shadow of man's ravage save his own,  
 When, for a moment, like a drop of rain,  
 He sinks into thy depths with bubbling groan,  
 Without a grave, unknell'd, uncoffin'd and unknown.”

SEC. 2. Publicists all agree that maritime nations have a curtilage of soil and jurisdiction, extending seaward a cannon shot or marine league from their respective coasts or shores as appurtenant to their territory, and that their territorial rights reach thus far into the seas, on the ground of permanent appropriation and ability to control it. Beyond this curtilage all agree that the high seas, the common undivided domain of all mankind, are free for navigation and use by all on terms of equality. (*L. N. by Von Martens*, Lond. ed. 160, 163, 164. *Vattel*, B. 1, c. 28, §§ 281—283. *Wheat. Int. L. P.* 2, c. 4, §§ 6—11. 7 *Webster's Dipl. Papers*, 85, 96, 97, 105, 106, 107, 382.) Grotius defended this principle, and has been followed by all publicists of authority. Azuni, in his *Maritime Law*, says, that the sea belongs to no one; it is the property of all men; that all have the same equal right to its use as to the air they breathe and to the sun that warms them. And he also affirms, that the use of the sea, light and air are alike common to all. *Vattel* says that no man has a right to take possession of the open sea, or to claim the sole use of it to the exclusion of other nations. As a consequence of this common right beyond a marine league from shore, he asserts a common right of navigation and fishery in all mankind on the high seas.

Wheaton says, that no nation can, from the nature of

the thing, obtain exclusive possession of the sea, and at pleasure exclude all others from its use; and he concludes thus: "It follows, then, that it cannot become the exclusive property of any nation." He also affirms, in addition, that no nation has the moral right, if it possesses the physical power, to appropriate the sea and exclude other nations from the common use of it, as the preservation of this common right has been ordained by God as the basis of commerce, intercourse and exchange of benefits essential to the moral well-being of the whole human race. Who, then, says he, shall dare to oppose his will to the accomplishment of this divine law? He adds, that it is thus demonstrated that the sea cannot become the exclusive property of any nation; that as the property in the whole cannot be thus appropriated, so neither can particular portions of that property, such as the rights of navigation, fishery, &c., be claimed by one nation to the exclusion of others. The use of the sea, for these purposes, remains open and common to all mankind.

We have seen, says he, that by the general approved usage of nations, which forms the basis of international law, the maritime territory of every State extends:

1. To the ports, harbors, bays, mouths of rivers and adjacent parts of the sea inclosed by headlands belonging to the same State.

2. To the distance of a marine league, or as far as a cannon shot will reach from the shore, along all the coasts of the State.

3. To the straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon shot from both shores, and communicating from one sea to another.

And he says that the exclusive sovereignty and jurisdiction of a maritime State in these cases are upheld by the reason of the rule of public law, which forbids an appropriation of the sea by any nation.

## STRAITS.

SEC. 3. Straits, though less than six miles wide, connecting seas, like those uniting the North Sea and the Baltic, the Mediterranean and the Black Sea, and all similar ones, partake of the freedom of the seas and are free to all nations. If such straits are only two marine leagues wide or less, and both sides are owned by the same nation, it may, for its own safety, exclude all foreign vessels of war from them, but they are of right free to the common use of all merchant vessels of all nations. (*Webster's Dip. Pap.* 382. *Wheat. Int. L. P.* 2, c. 4, § 10.) This doctrine is established by the Russian treaty with the Porte, applying it to the Bosphorus and Dardanelles, and by the treaty of Paris of 1856, making the Black Sea and its straits free to all merchant ships. Russia, in opening, by the treaty of 1829, to all nations, the free common right of navigating to and from the Black Sea, has powerfully contributed to the freedom of the seas.

The claim of Denmark to Sound dues or Danish tribute is denied on this ground by our republic. The refusal to pay Sound dues to Denmark by the United States, in 1857, produced a substitution of treaty stipulations to pay specific sums by different nations, that agreed to be paid by the United States being a fair equivalent for the maintenance of buoys and light-houses. So, our country has been instrumental in giving freedom to the Baltic.

## FREEDOM OF THE SEAS.

SEC. 4. From these well-established principles of public law and natural equity, to use the words of President Madison's Message to Congress, May 13th, 1813, enforcing the freedom of the seas, "It is obvious that no visit



or search, or use of force for any purpose, on board the vessels of one independent power on the high seas can, in war or peace, be sanctioned by the laws of another power." In short, from the above doctrines it follows, that a vessel of a nation on the high seas, is its floating territory, and exclusively subject to its jurisdiction, with all on board. And this is an established principle of public law. All violations of this floating territory by force, or entry on it against the will of the commander, by a foreign military or naval force, is an invasion of a nation's sovereignty as much as if such armed bands had, *vi et armis*, entered the nation's landed territory, or upon such vessel anchored a mile from it within its curtilage. John Quincy Adams truly declared, that all belligerent practices in violation of the freedom of the seas rested on force and not on natural right or sound and universally admitted principles of the law of nations. As Secretary of State, that eminent diplomatist and statesman, in giving the instructions of our government in 1823, to our minister to Columbia, said: "By the usage of nations, independent of treaty stipulations, the property of an enemy is liable to capture in the vessel of a friend. It is not possible to justify this rule upon any sound principle of the law of nature; for, by that law, the belligerent party has no right to pursue or attack his enemy without the jurisdiction of either of them. The high seas are a general jurisdiction common to all, qualified by a special jurisdiction of each nation over its own vessels. As the theatre of general and common jurisdiction, the vessels of one nation, and their commanders, have no right to exercise over those of another any act of authority whatsoever. This is universally admitted in time of peace. War gives the belligerent a right to pursue his enemy within the jurisdiction common to both, but not into the special jurisdiction of the neutral party. If the belligerent has a right to take the property



of his enemy on the seas, the neutral has a right to carry and protect the property of his friend on the same element. War gives the belligerent no natural right to take the property of his enemy from the vessel of his friend. But as the belligerent is armed, and the neutral, as such, is defenceless, it has grown into a usage that the belligerent should take the property of his enemy, paying the neutral his freight, and submitting the question of facts to the tribunals of the belligerent party. It is evident, however, that this usage has no foundation in natural right, but has arisen merely by force, used by the belligerent, and which the neutral in the origin did not resist because he had not the power. But it is a usage harsh and cruel in its operation and unjust in its nature; and it never fails, in time of maritime war, to produce irritation and animosity between the belligerent and the neutral. So universally has this been found to be its consequences, that all the maritime nations of modern Europe have shown their sense of it by stipulating the contrary principle, namely, that the property of an enemy shall be protected in the vessel of a friend." (See, also, *President John Q. Adam's Message to the Senate, December 26th, 1825.* 6 *Webster's W.* 325, 338, 340, 341. *Letters of Gen. Cass, Am. Minister at Paris, to Secretary of State, and Webster's Dip. Pap.* 103—131, 170—177.)

Napoleon, in his Berlin Decree of 1806, declared that the rights of war were the same on land as at sea; that at sea these rights could not be extended to any private property or persons not military.

Our republic has steadily maintained the freedom of the seas, and that our flag, the ensign of sovereignty, covered and protected American ships and all on board.

SEC. 5. As the municipal law of each nation cannot, *proprio vigore*, reach beyond its territory and curtilage, and as the high seas, broad and vast, are free and common

to all, upon principle, the freedom of the high seas to all mankind for commerce, fishing, pleasure and every lawful purpose, is beyond doubt or controversy.

SEC. 6. Great Britain, prior to the war of 1812, passed acts of Parliament by which, and orders in Council, she extended her municipal laws over the Atlantic Ocean, and all neutral vessels and trade thereon, imposing penalties and confiscation for disobedience to her imperious usurpations. Under these British laws and royal edicts a multitude of American ships were captured and confiscated; and British press-gangs on the high seas and on our coasts, boarded our ships, and many native and naturalized American seamen were seized there and carried off by force. Freedom of the seas was denied to Americans, and our republic was forced to declare war, in 1812, in defence of our maritime rights. During the Crimean war of 1855-'56, Great Britain and France agreed to the rule—free ships, free goods, &c.—thereby condemning the above violations of neutral rights on the high seas.

The European Congress at Paris, of 1856, has settled the principle of public law forever, as above laid down. Our republic now holds, as well as Napoleon III., that the freedom of the seas is part of the law of nations.

#### INLAND SEAS AND BAYS.

SEC. 7. The common nature of the sea belongs to inland seas, bays and arms of the sea, where two or more nations own different parts of their shores. Our great lakes Superior, Huron, St. Clair, Erie and Ontario, and the arm of the sea called the Bay of Fundy, are examples. The La Plata, of South America, really an inclosed part of the sea for a considerable distance, is another. In these and other like cases the right of navigation and fishery, be-

yond a marine league from the shores, belongs in common to all nations bordering such waters. In such cases a common use for all lawful purposes of such waters, beyond the curtilage, as well as of jurisdiction, of necessity, arises. Such great inclosed waters are incapable of separate and exactly divided use, according to the imaginary and unseen boundary lines of nations that are drawn across them on maps of such countries. The fish in such waters find a common feeding ground in the entirety, and migrate to and from the sea and from point to point, from jurisdiction to jurisdiction, the piscatory commonwealth being ignorant of partition lines, and being free commoners in its changing, waving, restless watery element. It is obviously a law of nature, that if two or more nations cannot have a separate dominion of such a watery domain, it must be enjoyed in common, and no shore State can properly seek to exclude another from it. Hence arises a principle of the law of nations that such inclosed waters, beyond the curtilage, to all nations owning its shores, are free for common use. This principle of public law exists among the States of our Union, founded on the above principles, with the addition that a common right of free navigation is extended to all the citizens of the United States.

What God has given for common use men should so enjoy in peace and gratitude.

#### AMERICAN EFFORTS IN FAVOR OF FREEDOM OF THE SEAS.

SEC. 8. Our statesmen and diplomatists, with Franklin at their head, during our Revolution and since, have sought to establish the great principles of freedom and justice upon the seas as well as upon the soil of our republic. They have endeavored to negotiate treaties exempting all private persons and property, by sea as

well as by land, from belligerent capture. They have strenuously asserted the principle of the treaty of commerce and navigation of Utrecht, of 1713, that free ships make free goods, and that the flag protects the ship, cargo and all persons on board, except military persons in the service of an enemy. Such was our treaty with Prussia of 1785.

The twelfth article of our treaty with Prussia, of 1785, says :

“ If one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining neutral with the belligerent powers, shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports, and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other ; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy.”

The reasons assigned by Franklin, Adams and Jefferson in their report for the new improvements in public law in that treaty, are given by them in these words :

“ By the original law of nations, war and extirpation were the punishment of injury ; humanizing by degrees, it admitted slavery instead of death ; a further step was, the exchange of prisoners instead of slavery ; another, to respect more the property of private persons under conquest, and be content with acquired dominion. Why should not this law of nations go on improving ? Ages have intervened between its several steps, but as know-

ledge of late increases rapidly, why should not those steps be quickened? why should it not be agreed to as the future law of nations, that in war hereafter, the following descriptions of men should be undisturbed, have the protection of both sides, and be permitted to follow their employments in security, viz:

“ 1. Cultivators of the earth, because they labor for the subsistence of mankind.

“ 2. Fishermen, for the same reason.

“ 3. Merchants and traders in unarmed ships, who accommodate different nations by communicating and exchanging the necessaries and conveniences of life.

“ 4. Artists and mechanics inhabiting and working in open towns.

“ It is hardly necessary to add that the hospitals of enemies should be unmolested; that they ought to be assisted.

“ If rapine is abolished, one of the encouragements to war is taken away, and peace, therefore, more likely to continue and be lasting.

“ The practice of robbing merchants on the high seas, a remnant of the ancient piracy, though it may be accidentally beneficial to particular persons, is far from being profitable to all engaged in it, or to the nation that authorizes it.” They add a strong condemnation of privateering. (See *Diplomatic Correspondence*, vol. 2, pp. 237, 238.)

Baron De Thulemeier, the Prussian Minister, in a letter to our negotiators of December 10, 1784, referring to the same subject, said:

“ The twenty-third article is dictated by the purest zeal in favor of humanity. Nothing can be more just than your reflections on the noble disinterestedness of the United States of America. It is to be desired that these sublime sentiments may be adopted by all the maritime

powers without any exception. The calamities of war will be much softened, and hostilities, often provoked by cupidity and the inordinate love of gain, will be of more rare occurrence." (*Ib.* vol. 2, p. 257. 2 *Sparks' Life and Works of Franklin*, 487.)

General Washington gave his approbation to this noble attempt to improve the law of nations and to secure the freedom of the seas. In a letter of Washington to Count de Rochambeau of July 31, 1786, speaking of our first treaty with Prussia, he said:

"The treaty of amity, which has lately taken place between the King of Prussia and the United States, marks a new era in negotiation. It is the most liberal treaty which has ever been entered into between independent powers. It is perfectly original in many of its articles, and should its principles be considered hereafter as the basis of connection between nations, it will operate more fully to produce a general pacification than any measure heretofore attempted amongst mankind." (See *Sparks' Writings of Washington*, vol. 9, p. 182.) Such was the solemn sanction of this great and good man of this proposed improvement of international law. (See *Gardner's Moral Law of Nations*.)

Henry Clay and John Quincy Adams, the one as Secretary of State, the other in that office and as President, labored earnestly to incorporate these noble principles, proposed by Franklin, into the law of nations. This was one of the objects of President Adams and Secretary Clay in supporting a congress of all American nations, a wise and patriotic measure, defeated by the South American internal difficulties. These men, eminent for diplomatic ability and knowledge, as well as for genius, enlarged statesmanship and devotion to liberty and the happiness of all mankind, have recorded their testimony in favor of the above doctrines. (See the Panama Instructions, *Am.*

*Ann. Reg.* for 1827—1829, P. 2, pp. 27, 29, 36—38. *Pres. Mess.* relating to it, and *Mr. Clay's Letter to Robert Walsh.*) In the latter Mr. Clay said that it was his intention, if possible, to have obtained from the Panama Congress a declaration making private property exempt from belligerent capture at sea, the same as upon land. James Buchanan, when Minister to Great Britain, asserted this as a settled American doctrine. Julius Cæsar gave to the Roman citizens a pecuniary legacy—Henry Clay has left this rich bequest to all nations. May God give the legatees the wisdom to accept it.

Secretary Marcy, in his letter in relation to the maritime treaty of Paris, of 1856, says, that our republic was desirous of exempting private property from capture by sea and land, and of incorporating this principle in the code international.

The treaty of Paris, of 1856, is an important step towards the American doctrines.

#### NATIONAL RECOGNITIONS OF AN IMPROVED MARITIME LAW.

SEC. 9. In 1713 the treaty of commerce and navigation of Utrecht was made between Great Britain, France and other great powers, by which it was stipulated that, on the high seas, the flag of every neutral nation should cover and protect the ship, cargo and all persons on board, except only arms, ammunition and munitions of war, strictly contraband, and soldiers in the actual service of the enemy. Great Britain, France and Spain, renewed this treaty by that of Paris, of 1763, and it was again sanctioned by a treaty between Great Britain and France in 1783, which renewed the treaties of 1713 and 1763. (*Wheat. Hist. L. N.* 86, 87, 115, 121—125. 1 *Chalmer's Treaties*, 231, 402, 403, 470, 497, 533.) The treaty between England and Portugal, of 1654, contains a like



doctrine. (2 *Azuni's Marit. L.* 162—165.) In the Crimean war all the belligerents assented to the above principles, securing the freedom of the seas. At the end of the war, the treaty of Paris of 1856 re-affirmed the same. Great Britain, in negotiation with the United States, acted substantially on the same principle. (5 *Am. St. Pap.* 211, 212.)

The Baltic powers, led by Russia, in 1780, and indeed all the principal nations of Europe as well as the United States, have supported these doctrines in laws or treaties. (2 *Azuni's Marit. L.* 364. *Wheat. Int. L. P.* 4, c. 3, § 23. *Wheat. Hist. L. N.* 297—303. *Act of Cong.* 1781.)

Neutral rights and the freedom of the seas were fully guaranteed by the just and equitable principles of the treaty of Utrecht; for the exception merely prevented neutral vessels from aiding either belligerent, and assuming a *quasi* hostile character, as a party to the war, inconsistent with neutrality.

The efforts of Russia for the freedom of the seas are worthy of especial commendation. In order to effect it, Russia has led the way, and has sought to obtain the consent of Christendom to principles which might have been incorporated into the code of public law with great advantage to mankind. The Empress of Russia published a declaration, dated the 26th day of February, 1780, and communicated it to the courts of London, Versailles, Madrid and other powers, as well as the United States, in which the following principles of international law were asserted:

1. That all neutral vessels may freely navigate from neutral ports to those of either belligerent, and on the coasts of nations at war, from port to port, if the local laws permit.

2. That the goods belonging to the subjects of the



powers at war shall be free in neutral vessels; except contraband articles.

3. That contraband should be confined to arms, ammunition and munitions of war.

4. That a blockaded port is one so closely besieged by a sufficient number of ships of war to create an evident danger of capture to vessels attempting to enter it. (*Receuil des Traites, by Martens & Cussy*, pp. 193, 194. *4 Spark's Dip. Cor.* 488, 490. *Wheat. Hist. L. N.* 297, 298, 397.) France, Spain, Sweden and Denmark officially assented to the principles of the declaration of the Empress. (*Ib.* 299—302.) The United States, by act of Congress of May 8th, 1781, and Prussia, Austria, Portugal, the Netherlands and the King of the Two Sicilies, also assented officially to the above principles of the Russian declaration. (*Ib.* 303.)

Other nations, under the influence of the United States, have, by numerous treaties, made public declarations in favor of the freedom of the seas. The treaty between the United States and Brazil, of 1828, with Colombia, of 1824, with Mexico, of 1831, with Venezuela, of 1836, with Chili, of 1832, with Peru and Bolivia, of 1836, substantially stipulate that free ships make free goods, and that the flag covers all merchandise on board, except strictly contraband of war, though belonging to the enemy of the contracting party, all persons on board, though enemies, except officers and soldiers in the actual service of the enemy. And the treaties define contraband to mean arms, ammunition and munitions of war, such as balls, powder, instruments constructed for military use, cavalry or military horses and furniture, and all things constructed to make war by sea or land. They provide, that where such contraband is found on board, it may be taken with the least possible inconvenience to the ship having them, and may be confiscated; but that the rest of the cargo and ship shall go

free. (8 *U. S. St. L.* 310, 312, 314, 417, 418, 490—492.)

These treaties provide, that they shall not protect the property of any belligerent government that refuses to acknowledge the principle of free ships free goods.

They also stipulate that neutral property belonging to a party to such treaties, if found on board an enemy's vessel, shall be deemed enemies' property, and liable to condemnation, where, under the treaty, the neutral contracting party covers enemies' goods from capture by its flag; unless such neutral property was put on board before the declaration of war, or without knowledge of it.

These are solemn declarations of American nations in favor of the freedom of the seas, and of appropriate practical international regulations for its establishment and security. They are but a repetition of principles which European nations have sanctioned on many occasions and for long periods.

In March, 1854, Great Britain and France declared war against Russia, and the Queen made the following declaration of respect for the rights of neutrals:

“DECLARATION.

“Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

“To preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

“It is impossible for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches;

and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors or coasts.

"But her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

"It is not her Majesty's intention to claim the confiscation of neutral property not being contraband of war found on board enemy's ships; and her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

*"Westminster, March 28, 1854."*

Upon the official communication to the American government of the adoption by Great Britain and France of the rule free ships free goods, Secretary Marcy, by direction of the President, declared to the British Minister the President's satisfaction that the principle that free ships make free goods, which the United States have so long and strenuously contended for as a neutral's right, and in which some of the leading powers of Europe have concurred, to have a qualified sanction by the practical observance of it in the present war, by both Great Britain and France, two of the most powerful nations of Europe. Notwithstanding the sincere gratification which her Majesty's declaration has given to the President, it would have been enhanced if the rule alluded to had been announced as one which would be observed, not only in the present, but in every future war in which Great Britain shall be a party. The unconditional sanction of this rule by the British and French governments, together with the practical observance of it in the present war, would cause

it to be henceforth recognised throughout the civilized world, as a general principle of international law.

This government, from its commencement, has labored for its recognition as a neutral's right. It has incorporated it in many of its treaties with foreign powers. France, Russia, Prussia and other nations have in various ways concurred with the United States in regarding it as a sound and salutary principle, in all respects proper to be incorporated into the law of nations. The same considerations which have induced her Britannic Majesty, in concurrence with the Emperor of the French, to present it as a concession in the present war, the desire to preserve the commerce of neutrals from all unnecessary destruction, will, it is presumed, have equal weight with the belligerents in any future war, and satisfy them that the claims of the principal maritime powers, while neutrals, to be recognised as a rule of international law, are well founded, and should be no longer contested. To settle the principle that free ships make free goods, except articles contraband of war, and to prevent it from being again called in question, from any quarter or under any circumstance, the United States are desirous to unite with any other powers in a declaration that it shall be observed by each, hereafter, as a rule of international law. The exemption of the property of neutrals, not contraband, from seizure and confiscation when laden on board an enemy's vessel, is a right now generally regarded by the law of nations. The President is pleased to perceive, from the declaration of her Britannic Majesty, that the course to be pursued by her cruisers will not bring it into question in the present war.

France has announced her assent to the same doctrine, substantially to the same effect as Great Britain. Soon after, at the banquet given to Lord Elgin in London, after Lord John Russell and other official gentlemen had declared the good will of England for our republic, the

then American Minister, now President, James Buchanan, formerly Secretary of State of the United States, rose, in reply to a complimentary toast from a distinguished British lord, and declared the reciprocal good feeling of Americans for the people of Canada and Great Britain, his satisfaction at the Queen's recognition of the rights of neutrals in the war with Russia, and his strong hope that the time would soon come when private property, belonging to peaceful non-combatant persons of belligerent nations, should enjoy on the high seas the same immunity from capture and confiscation which is now allowed such property on land. This is the policy of our republic.

This is the true principle laid down by Franklin, and assented to by Napoleon I. and by many of our leading statesmen. It is the great improvement of the law of nations, demanded by the spirit of the age and by the principles of the Gospel.

The concession thus made to neutral rights must be considered as an abandonment of the right of searching neutral ships for enemies' goods, except strictly contraband of war, or of entering neutral ships to impress or arrest foreign seamen there. It is certain that it will be so considered by the United States, and that American ships will never again submit to such unjustifiable, forcible search or entry, by any foreign cruiser or ship-of-war.

Since the above was written, the United States and Russia have, by treaty, made and signed the following articles :

" *Art. 1.* The two high contracting parties recognise as permanent and immutable the following principles, to wit :

" 1. That free ships make free goods—that is to say, that the effects or goods belonging to subjects or citizens of a power or State at war, are free from capture and con-

confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

“ 2. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war. They engage to apply these principles to the commerce and navigation of all such powers and States as shall consent to adopt them on their part as permanent and immutable.

“ *Art. 2.* The two high contracting parties reserve themselves to come to an ulterior understanding, as circumstances may require, with regard to the application and extension to be given, if there be any cause for it, to the principles laid down in the first article. But they declare from this time that they will take the stipulations contained in said article first as a rule, whenever it shall become a question, to judge of the rights of neutrality.

“ *Art. 3.* It is agreed, by the high contracting parties, that all nations which shall or may consent to accede to the rules of the first article of this convention, by a formal declaration stipulating to observe them, shall enjoy the rights resulting from such accession as they shall be enjoyed and observed by the two powers signing this convention. They shall mutually communicate to each other the results of the steps which may be taken on the subject.

“ *Art. 4.* The present convention shall be approved and ratified by the President of the United States of America, by and with the advice and consent of the Senate of said States, and by his Majesty, the Emperor of all the Russias, and the ratification of the same shall be exchanged at Washington within the period of ten months, counting from this day, or sooner, if possible.”

The treaty of Paris, of 1856, declares against all paper blockades, and in favor of the old rule of public law that free ships make free goods, and that the flag protects the

ship and all on board, contraband of war, and naval and military persons in the service of the enemy only excepted, as established by the treaty of Utrecht. (*Oh* 7.)

#### SELF-DEFENCE.

SEC. 10. The right of self-defence is not confined to a nation's territory and curtilage. Hence nations pass laws to seize and bring in for adjudication any vessel, domestic or foreign, bound for its ports, hovering around its coasts beyond a marine league from its shores, for the purpose of illicit trade, without paying duties. The British act (9 Geo. II. ch. 35) assumes four leagues from the coast as the limit of this protecting jurisdiction to prevent frauds on the revenue, and our act of Congress is to the same effect. The precise limits of this power is not fixed, but must depend on the situation of each coast, and it rests on a right of self-protection and a *quasi* jurisdiction over any vessel sailing for its ports for an unlawful and injurious object.

Upon the principle of self-protection and the preservation of its commerce, a nation forbids belligerent cruisers from hovering around its coasts, in the tracks of its trade, to its injury, and may compel them, if need be, to depart by the use of force.

The distance is not fixed, but depends on the nature of the coast and the circumstances, and of these each government must judge for itself, being responsible for a just and reasonable application of the rule. The American government has declared that foreign armed ships shall not be permitted to cruise within the Gulf Stream against neutrals trading to American ports. (See *President Jefferson's Mess. to Cong.* of Dec. 3, 1805.)

These protecting laws are not assertions of jurisdiction over the high seas, but acts of self-defence to prevent



injuries from those sailing thereon, with hostile or unlawful intent, in reference to the nation making such enactments. They are necessary acts of self-defence.

The monarchies of Europe, by the treaty of Verona of 1822, intended to suppress representative government in Europe and America, and have often sought, by forcible interventions, to control American interests. In 1851 the combined fleets of Great Britain and France attempted a protectorate of Cuba and the search of American vessels, which our republic promptly resisted, and it was quietly abandoned.

#### ILLEGAL MARITIME USAGES.

SEC. 11. Most powerful maritime nations have too often forgotten right and resorted to unjustifiable practices. Athens, free, glorious Athens, the light of antiquity, was a naval power. Though blessed with the philosophical instructions of Aristotle, Socrates, Plato and Solon, her laws allowed associations for irregular war, and the capture of private persons and property. It was a kind of legalized piracy. Tyre and Carthage probably paid as little respect to the rights of foreigners or of humanity, but they produced no Thucydides to record their noble and unworthy deeds. Portugal, Spain and Great Britain successively, in the plenitude and intoxication of their naval supremacy, have invaded the freedom of the seas and sought to appropriate the common maritime rights of all mankind.

God led forth our fathers and planted them in the wilderness of America with his law for their guide. In 1776 they awoke a world, slumbering in despotism, by the declaration of the independence of the United States. By the good providence of the Most High they have become



a great maritime people, and the chosen defenders of free institutions and of the freedom of the seas.

#### A SHIP A NATION'S FLOATING TERRITORY.

SEC. 12. If a ship or vessel on the high seas is its floating territory and exclusively subject to its jurisdiction, she, being a peaceful neutral, is entitled to entire immunity there from forcible entry, search or visit by any foreign armed vessel, or any foreign officers in peace or in war, and that she is of right free from all foreign intrusion, interference or control. The only additional rule would be for each vessel to sail, fish and use the high seas so as not to injure, by collision or otherwise, any other vessel, as all are entitled to an equal common use.

The freedom of the seas being now settled, a European and American board of international commissioners might easily compile a code of the law of nations that would no doubt be generally, if not universally, adopted.

#### EXEMPTION OF PRIVATE PROPERTY FROM CAPTURE AT SEA.

SEC. 13. This is the great aim of American policy and has long been so, and it is a dictate of natural justice and humanity. In the spring of 1853 the author sent a written memoir to Hon. Mr. Marcy, Secretary of State of the United States, recommending negotiations to procure the assent of Russia, France and other continental European governments to the principle of "free ships, free goods," and to the entire exemption of private property at sea from belligerent capture, the great American principle for securing the freedom of the seas. The result of the movements of our government was a permanent recognition of the doctrine of "free ships, free goods," freedom of private property and persons by Russia, Mexico and Naples,

and the assent of France and Great Britain, during the then existing war between Russia against the two latter powers and their allies, and finally the declaration of the allies in the Congress of Paris, above stated. The maritime treaty of the Congress of 1856 was another providential consequence of this American movement, and of Russian and French diplomacy.

Since this chapter was originally written James Buchanan has become President of the United States. The United States, with their great commercial marine and rapidly increasing power and resources, will, no doubt, adhere to a pacific policy, and devote their energies to conquering to civilization, peopling and improving the vast national domain. The people of this republic, though peaceful, are essentially warlike when called upon to defend our national rights. Our national character and policy are decidedly pacific. As the ocean in a calm is gentle, so are our people in peace; but in war they are like the storm-lashed ocean, moving by their own impulse, with an irresistible power in volunteer armies and navies. Standing armies and navies will always be small in this country, and the main reliance in war will be upon volunteer armies and navies. No foreign power, or combination of foreign powers, can change this, or prevent this country from employing its martial people as heretofore practised.

Mr. Buchanan's declarations, while Minister in England, will henceforth be the American doctrine on this subject. He said to Lord Clarendon, when private property, by the influence of our republic and by the progress of Christian civilization, shall be exempt from capture, as it will be in half a century, then it will become a question whether letters of marque and reprisal against private property at sea can properly be issued after that happy era shall have arrived. The confiscation of private property on land, or

its capture at sea to pay debts due from one nation to another, will necessarily cease to be a part of national process of redress. The freedom of the seas rest upon the great principle, that the ships of every nation on the high seas form a part of its floating territory, and that its jurisdiction and sovereignty there are supreme and exclusive.

James Buchanan thus declared this doctrine: "It did not seem to him possible, under existing circumstances, for the United States to agree to the suppression of privateering unless the naval powers of the world would go one step further, and consent that war against private property should be altogether abolished upon the ocean as it had already been upon the land. There was nothing really different in principle or morality between the act of a regular cruiser and that of a privateer in robbing a merchant-vessel upon the ocean and confiscating the property of private individuals on board for the benefit of the captor. Suppose a war with Great Britain; the navy of Great Britain was vastly superior to that of the United States in the number of vessels of war. The only means which we would possess to counterbalance, in some degree, their far greater numerical strength, would be to convert our merchant vessels, cast out of employment by the war, into privateers, and endeavor, by their assistance, to inflict as much injury on the British as they would be able to inflict on American commerce. The genuine dictate of Christianity would be to abolish war against private property upon the ocean, and only apply the navies of the world in public warfare against the enemy as their armies were now employed."

And, on a subsequent occasion, (May 12, 1854,) Mr. Buchanan, speaking with reference to the employment of subjects of neutral powers in privateers, says: "There is no safe means for us between preserving the rights of maritime war upon the sea as they exist, and abolishing all

war, whether by privateers or regular cruisers, against private property, upon the ocean as well as upon the land."

So thus Franklin, Henry Clay, John Q. Adams, William L. Marcy and James Buchanan, representing the common opinion of American statesmen, have insisted upon the exemption of private persons and property by sea and land from belligerent capture or injury. The American government and people are determined to introduce into the law of nations this noble, humane and just principle. By the year 1900, when eighty millions and upwards of intelligent freemen shall occupy our republic, with a commerce, wealth and power quadruple that now existing, this new rule of public law will be assented to by all nations, and war and its horrors will be confined to an armed duel between armies and navies and forts, &c.

#### FREEDOM OF THE SEAS ESTABLISHED.

SEC. 14. These doctrines, excepting the privateering void condition, have on some occasions been before assented to by Great Britain. The armed neutrality, following the claims of Holland and Prussia, on former occasions, asserted the freedom of the seas, by putting forth the same rules of public law sanctioned by the Congress of 1856. By the treaty of Utrecht, England assented to these improvements of the maritime code. Russia and France again and again affirmed, as part of the law of nations, these doctrines, with the exception of the one relating to the employment of a volunteer armed marine in time of war, a right and an attribute of sovereignty of every nation. The United States, Denmark, Sweden, Prussia, France, Spain, Portugal, Holland, Naples and several American governments have assented to the improved public law as set forth by the armed neutrality. (*Hosack on the Rights of Neutrals*, 4, 5, 6, Lond. ed.)

After such sanctions of the improved maritime code, concurred in so universally and for such a long period, the Congress of Paris, of 1856, has officially announced the fact of the incorporation of these ancient doctrines by common consent, into the universally recognised law of nations.

The new provision, prohibiting the employment of privateers in war, was of no consequence to any European nation, and was ungraciously presented to our republic, which relies on volunteer armies and navies mainly for defence. Phillimore, an able British writer on international law, affirms, that every nation has the right, as an attribute of sovereignty, and that it is its duty to defend and preserve its existence, and its national happiness and prosperity, and that no other government can lawfully prescribe what means of self-defence another State shall employ. Every member of the Congress of Paris must have supposed the privateering condition a mere apology for the British Minister to agree to the freedom of the seas, long demanded by Russia, France and the United States, and which they had the power to enforce by arms. Every member knew that the United States had offered, and were ready to improve the code international, by declaring all private ships and cargoes of belligerents, as well as those of neutrals and enemies, persons and property in neutral ships, free from capture in war, but that her main reliance for defence was on volunteer armies and navies, and that the great maritime power of the West would not seriously consider this polite royal request, to resort to great standing armies and immense navies, dangerous to our liberties and our prosperity, instead of entrusting the citadel of freedom to the brave hearts and strong hands of the American sons of liberty.

Napoleon III., at the celebration of the great artificial harbor of Cherbourg, in a speech declared that the Con-

gress of Paris had settled forever the freedom of the seas. The United States, France and Russia will guarantee the entire freedom of the seas, and Great Britain and all other nations will assent to this great and fundamental principle of the law of nations.

SEC. 15. At the commencement of the administration of President Pierce, the author of this work addressed a memoir to Mr. Marcy, Secretary of State, representing that our war with Great Britain, of 1812, had for its object the establishment of the freedom of the seas, and to protect the property and persons on board neutral ships, and that the treaty of peace merely adjourned the controversy, and that diplomacy or war must soon settle whether a neutral ship on the high seas should enjoy the protection of its flag, or be subject to belligerent visit and search for enemy's goods and persons. It was suggested to the Secretary to make separate treaties, affirming free ships, free goods and free persons on board, and that the flag protects the neutral ship and all on board, with Russia, France, Prussia and other maritime nations, so as to compel Great Britain to quietly assent, if she refused to treat. This led to the treaty with Russia, and on the breaking out of the war between Russia and the allied powers of Turkey, France and Great Britain, our government demanded of the allies the rights secured by the treaty with Russia, and they agreed that, during the war, it should be adopted as a rule of public law. At the Congress of Paris it was adopted as a permanent rule of international law as to all nations accepting it, and waiving privateering, the last being a void condition. Thus, the freedom of the seas has been finally settled by diplomacy.

## VISIT AND SEARCH.

SEC. 16. On shore, a man's house is his castle, and no one can enter of his own motion without the owner's leave. If any criminal charge is preferred on oath to a magistrate, and process is issued, the officer may search the place designated, and so far a man's house is open to entry and search. An American ship is a floating dwelling on seas and oceans, and subject to the exclusive occupancy of its American inhabitants and to the law of its country, of which the stars, stripes and the eagle are the insignia, waving over the protected ship. As the high seas are common to the free navigation of all nations, by the law of nature and nations they are not under the jurisdiction of any one. Now, upon principle, the ships of neutral, peaceful nations are, as to all foreign armed ships, like their own territory and curtilage, beyond foreign jurisdiction, and not subject to any compulsory visit or search, unless a treaty shall specially authorize it. In the latter case, the treaty occupies the place of the search-warrant on land, and nothing beyond their tenor can be done in either case. This is the only rule compatible with the freedom of the seas, and our republic has often upheld this doctrine. In 1858, the attempt of the British cruisers to search or visit our ships, on pretence of looking for slavers, was promptly protested against on the above grounds, and it was abandoned. Great Britain, if she chose, could in three months, by blockading Cuba, compel Spain to put a stop to the African slave trade, agreeable to her treaty with Great Britain. Neither this pretence nor any other will induce our republic to subject our floating territory—our ships—to any foreign jurisdiction.

The above is the true law of nations, and essential to their independence. Our experience of maritime tyranny and aggression on the high seas will prevent our assent to any exercise of any foreign authority to detain, visit or search American vessels. An infraction of this immunity of our ships and of this enjoyment of the freedom of the seas will not be likely soon to recur.

This immunity belongs to every nation by virtue of its sovereignty.



## CHAPTER XI.

### OF THE RESPONSIBILITY OF A NATION.

SEC. 1. All acts of the government of a country, of its armies and armed ships, of its officers, judicial, civil, military or naval, as well as of its agents, if previously authorized or subsequently ratified, or silently approved, are national, and foreign nations may demand satisfaction for all injury arising from such acts to them respectively, or to the property or personal rights of their citizens or subjects. (*Vattel*, B. 2, c. 6, §§ 71—74; B. 3, c. 7, § 113. *Report in Senate, U. S., in 1852, by the Committee on Foreign Relations, on the Mexican Repeal of the Tehuantepec Grant, owned by American citizens. Lord Palmerston's Circular of January, 1848, as Minister of Foreign Affairs of Great Britain, to British Ministers at foreign courts, in reference to debts due British subjects from foreign nations. Mr. Buchanan, Secretary of State's Instructions in reference to the American Seely's claim for the recovery of the crown jewels of Holland.*)

SEC. 2. A nation is responsible to foreign governments for the decisions of its tribunals and the action of its police, if unjust and injurious to foreigners in their persons or property. (*Wheat. Int. L. P. 4, c. 2, § 15. 2 Phillimore on Int. Law, 24—26.*) Grotius asserts this doctrine. Such judicial or police acts are national. On this ground our republic and other nations review such proceedings of foreign nations, and if found to be in violation of the principles of natural equity, of the law of nations or of

the *lex loci*, the foreign government may justly claim satisfaction for the injury. On this ground our republic demanded compensation for the destruction of American lives and property at the Panama massacre by the New-Granadian police and mob, and payment for the lives and property will be and ought to be enforced.

Some maintain, that if the *lex loci* and police action upon foreigners are the same as upon citizens and subjects, the foreign State has no right to complain. This cannot be the true rule when applied to despotic countries where arbitrary power substitutes its will for regular judicial and police action, though it would be correct when applied to the United States, where the principles of natural equity are constitutional and elementary doctrines, securing the rights of persons and property alike to citizens and foreigners. If any country admits foreigners, they are entitled to national comity, hospitality and protection, and it is no answer to a violation of these duties to say, that a despotic government tramples upon the rights of its subjects habitually, and treats subjects and foreigners alike.

A nation cannot, agreeable to principles of national comity, refuse the use of its courts to foreigners to obtain justice from any person found within its territory.

The unjust action of the tribunals of Great Britain and France in condemning American vessels in violation of natural equity and of public law, has been cause of war with the former, and of successful demand of damages from the latter. Moses, the divine law-giver, thus enjoined this law on the Jewish nation: "Ye shall neither tax a stranger nor oppress him, for ye were strangers in the land of Egypt."

SEC. 3. Nations are responsible to foreign governments when they unjustly refuse or unreasonably omit to pay to foreigners national debts due to them. But in ordinary cases of debts due from one nation to the citizens of

another, the government of the latter does not interfere. The right to demand and enforce such claims exists, but its actual exercise is a question of discretion. In cases where national considerations are connected with such private claims, it is the right and duty of the nation to demand for its citizens the satisfaction of their just claims on any foreign nation, and to compel it, if necessary.

This was the doctrine of Daniel Webster, Secretary of State of the United States, in reference to the Tehuantepec grant made by Mexico, duly assigned to American citizens, and afterwards repealed by the Mexican Congress in a spirit of wanton injustice to the American owners and of hostility to our republic. When negotiations for our treaty of peace with Mexico were pending, the American negotiator asked for an American right of way across the Isthmus of Tehuantepec, and the Mexican negotiator replied, that Mexico had granted already the exclusive right of way to a Mexican citizen, and that he had transferred it to foreign subjects, of whose rights Mexico could not dispose; thus solemnly declaring to the American government the validity of the grant and of the assignment. Upon the faith of the grant and its recognition, American citizens bought this important grant, asked and obtained leave from Mexican officials to make surveys pursuant to the title, franchises, &c., and expended large sums thereon. Mexican ingenuity then put forth an alleged defect of title, to wit: that the Dictator Salas, prior to such negotiation and recognition, had illegally extended the time of performing the conditions of the grant, though all his other dictatorial and governmental acts were then and are now held valid and legal in Mexico. On this pretence, but doubtless for other reasons, the Mexican Congress, without notice to the assignees, *ex parte* repealed the grant, and caused the American owners to be forcibly dispossessed. Satisfaction was demanded by our republic

and refused by Mexico. Senator Mason, of Virginia, Chairman of the Committee of Foreign Affairs in the Senate of the United States, reported, in 1852, that the title of the American assignees to the Tehuantepec grant was perfect, and that our government ought to enforce it.

That is the doctrine of the American government, and it is founded upon a just regard for the rights of its citizens and for the honor and interest of our republic. This grant is of great national importance, as well as of great value to the American owners of it.

All American citizens, whether merchants, travellers, clergymen, missionaries or persons of any other occupation, are entitled to the national protection. This right to the shield and sword of the republic extends to Americans domiciled abroad; and if they or any of them are wronged in person or property, or in the inalienable rights of religious and civil freedom, the republic ought to compel satisfaction for such injuries to its citizens. The case of Dr. King seems to be a clear case of wrong, demanding the protection of our government and satisfaction by Greece. This excellent man has been deprived of his property by the Grecian government, and condemned to imprisonment and exile by a Grecian court for preaching the Gospel. Socrates was condemned and executed in ungrateful Athens for disbelief in Jupiter and his fellow gods and goddesses of Grecian mythology, and Dr. King, the benefactor of modern Greece, is treated as a malefactor and robbed of his property. Considering the aid given by by this country to Greece at her revolution, her conduct is stamped with the basest ingratitude and calls for redress. It has since been demanded by our republic and made.

It is plainly a duty of every nation to protect the important personal and property rights of its citizens from invasion by foreign governments. (2 *Phillimore on Int. Law*, 26—28.)

SEC. 4. Nations are responsible for the violations of national comity, of treaties, conventions and compacts by its agents, officers and tribunals.

So any attempt of one nation, of its officers or agents, in their official character, to promote rebellion in a foreign country, or to control the domestic affairs of another government, or to punish any act done abroad by foreigners, and lawful there, are a national wrong to the latter, for which the former is responsible. (*Ib.*) Mere speeches or writings not official, of government officers, are not national.

But a nation may lawfully appoint an agent to ascertain whether a revolutionary or other government is really one *de facto*, and capable of performing national duties. Mr. Secretary Webster, in his letter to the Austrian representative of December 21, 1850, maintained this doctrine, and it has been the usual practice of our republic.

In the course of his able and eloquent letter, the Secretary of State thus asserts our national independence and freedom: "Towards the conclusion of his note, Mr. Hulsemann remarks, that 'if the government of the United States were to think it proper to take an indirect part in the political movements of Europe, American policy would be exposed to acts of retaliation and to certain inconveniences, which would not fail to effect the commerce and industry of the two hemispheres.' As to this possible fortune, this hypothetical retaliation, the government and people of the United States are quite willing to take their chances and abide their destiny. Taking neither a direct nor an indirect part in the domestic or intestine movements of Europe, they have no fear of events of the nature alluded to by Mr. Hulsemann. It would be idle now to discuss with Mr. Hulsemann those acts of retaliation which he imagines may possibly take place at some indefinite time hereafter. These questions will be discussed when they arise, and Mr. Hulsemann and the Cabinet at

Vienna may rest assured that, in the mean time, while performing with strict and exact fidelity all their neutral duties, nothing will deter either the government or people of the United States from exercising, at their own discretion, the rights belonging to them as an independent nation, and of forming and expressing their own opinions freely and at all times upon the great political events which may transpire among the civilized nations of the earth. Their own institutions stand upon the broadest principles of civil liberty, and believing these principles, and the fundamental laws in which they are embodied, to be eminently favorable to the prosperity of States—to be, in fact, the only principles of government which meet the demands of the present enlightened age—the President has perceived, with great satisfaction, that in the constitution recently introduced into the Austrian empire, many of these principles are recognised and applied, and he cherishes a sincere wish that they may produce the same happy effects throughout his Austrian Majesty's extensive dominions that they have done in the United States." (6 *Webster's W.* 491.)

The doctrines of public law relating to national responsibility were happily explained by Mr. Webster in his negotiations with Mexico of July 8, 1842.

Mr. Webster, in his instructions of July 8, 1842, to our Minister at Mexico, denied that our republic had violated her duties of neutrality towards Mexico. He maintained that from the battle of San Jacinto in April, 1836, Texas was an independent nation *de facto*; that while Texas was part of Mexico, pursuant to a Mexican colonization law, many thousand American citizens were induced to emigrate there and expatriate themselves; that these colonists, driven by what they deemed oppressions by the military stationed in Texas, sought relief by revolution and a declaration of independence, after applying in vain

to the Mexican government for redress. The result, he said, was the victory of the 21st of April, 1836, and the establishment of Texian independence, which was acknowledged by the United States in March, 1837; and that its example had been followed by several of the most considerable powers of Europe, England, France and Belgium.

That the commerce of our republic with Texas, as with Mexico, may have had articles contraband of war mingled with it; and that this furnished no ground of national complaint, but that, when such articles were on board American merchant-ships going to Texas, Mexico, by the law of nations, had the right to intercept the transit of such articles to her enemy. This (said he) is the common right of all belligerents, and belongs to Mexico in the same extent as to other nations. That if American merchants, in the way of commerce, had sold munitions of war to Texas, the government of the United States, nevertheless, were not bound to prevent it, and could not have prevented it without a manifest departure from the principles of neutrality, and was in no way answerable for the consequences; that our treaty of 1831 with Mexico expressly allowed our ships to trade to and from the ports of her enemy with merchandise, bearing contraband of war contrary to the ordinary rule of the law of nations; that since April, 1836, the American trade in munitions of war had been larger with Mexico than with Texas, and that the United States had treated both alike.

That, at an early period of the Texian revolution, the President of the United States had given strict orders to our officers on the south and southwestern frontier to enforce our laws to preserve neutrality, and that those officers were still charged with that duty. That no forces had been raised or vessels fitted out against Mexico, in our republic, to the knowledge of the government.

That as to advances, loans or donations of money or



goods made by individuals to the government of Texas or its citizens, that there was nothing unlawful in this, so long as Texas was at peace with the United States, and that these were things which no government undertakes to restrain.

As to emigration to Texas (Mr. Webster said) that by our Constitution and laws our citizens had the right of emigration and expatriation, and had practised it to Mexico before the revolution and to Texas after that event; that they thereby ceased to be citizens of the United States, and changed their allegiance and their domicil. That the United States always has denied the doctrine of perpetuity of natural allegiance; that Mexico has naturalization laws based on the same principles; and that during the Mexican war of independence with Spain multitudes from the United States, England, Ireland, France and Italy flocked to the Mexican standard of liberty, though Spain, for nearly twenty years after the Mexican declaration of independence, claimed Mexico as her rebellious province.

That our republic, as to individuals who had emigrated and entered the Texian or any foreign service, no longer held over them the shield of its protection, the government of the United States cannot be called upon to prevent their emigration; that the Constitution, public treaties and laws of the Union, compelled the President to treat Mexico and Texas, as two belligerent nations, alike.

Mr. Webster maintained that the United States had shown patience and forbearance towards Mexico, under repeated wrongs inflicted on American citizens by the authorities of Mexico, admitted by Mexico, and for which redress had been sought in a spirit of peace and justice; but that if peace between the two countries was to be disturbed by Mexico, she must be answerable for the consequences. He emphatically added, the United States, let



it be again repeated, desire peace. It would be with infinite pain that they should find themselves in hostile relations with any of the new governments on this continent. (*Webster's Dipl. and Of. Pap.* 304—315. 6 *Webs. W.* 445.)

Such was the conclusive and unanswerable defence of our republic.

SEC. 5. A nation is responsible if it allows its neutral territory or curtilage to be used by one belligerent to attack another, and in all such cases the neutral is bound to demand and enforce satisfaction to the injured belligerent. (*Wheat. Int. L. P.* 4, c. 3, §§ 7—12.) So, if they are allowed to be used to facilitate hostilities. (*Ib.* 4 *Hamilton's W.* 467, 468.)

So, a government is responsible for injuries to a foreign minister or executive, or to a consul in his official character, by a mob, from hostility to his nation. This was so held, by Mr. Secretary Webster, in reference to the Spanish consul at New-Orleans. (6 *Webs. W.* 511, 512.)

Where rights of private persons, foreigners, are injured by private persons, mobs, &c., there seems no national obligation to answer for such acts, but they are left to their legal remedies like citizens.

SEC. 6. Nations are not liable for transactions and contracts of their citizens with those of foreign governments: such are debts, marine trespasses, violations of foreign blockades, revenue, penal or criminal laws; carrying contraband of war to a belligerent for sale; *bona fide* emigration of citizens of a neutral into a belligerent State, and there engaging in the war; libels on a foreign nation or its executive; and public meetings of citizens or refugees, expressing their opinions of foreign governments, or of any foreign king, consul or executive. All expressions of public opinion by national assemblies or other bodies upon acts of other nations, deemed against humanity or the law of nations, impose no responsibility to any foreign

State. Allowing asylum to foreign political offenders, or to criminals or to deserters, except in violation of treaties, gives no just ground of complaint to any foreign nation. (*Ch.* 4, §§ 39—42. 7 *Wheat.* 340. 1 *Kent's Com.* 5th ed. 141, 142. *Ante*, § 4. 4 *Hamilton's W.* 558.)

In the case of the heirs of Emerson *vs.* Hall, (13 *Pet.* 413,) the Supreme Court of the United States, after stating that debts could not be created against our own government without its assent, say, that "A claim against a foreign government for spoliations is not of this character. The demand is, in such case, founded upon the law of nations, and the obligation is perfect on the offending government. It is true, remuneration cannot be recovered against the government by action at law, but if justice be not done, the government of the injured citizen, in the exercise of its discretion, will protect and enforce his rights."

SEC. 7. National responsibilities continue notwithstanding changes in the form of government.

SEC. 8. As official acts, civil, military and naval, previously authorized or subsequently ratified, are national, it seems necessarily to follow that no action or proceeding, civil or criminal, can be brought in any court, of any country, against the official agents, if acting within the scope of their legal authority. (13 *How.* 115. 6 *Webs. W.* 247, 268, 269, and *Vattel* and publicists there cited. *Ch.* 1, § 22. *Ch.* 4, §§ 5, 44, 52. *Ch.* 12, § 30.)

Our national courts have settled these principles:

In *Mitchell vs. Harmony*, on a writ of error, (13 *How. R.* 115, 128,) the Supreme Court of the United States decided—1. That a seizure of the trader (Harmony's) goods by Colonel Mitchell, pursuant to Colonel Doniphan's order, for selling goods to the Mexicans, in their invaded country, which he had been duly authorized to do, was not justifiable, (p. 132,) on the ground that he

traded with Mexicans who had submitted to the Mexican arms, and were under the protection of the American flag, and that such trade was sanctioned by the President of the United States, and the commander of the American army in Mexico as a matter of public policy. 2. That an officer in time of war in a foreign country, in cases of immediate and impending danger from the public enemy, or an urgent necessity for the public service, may justify the taking of private property for the public service, or he may take or destroy it to prevent it from falling into the hands of the enemy; and that if he acts honestly and to the best of his judgment, the law will protect him; (p. 134;) and that a court and jury, in judging of that necessity must judge of the facts as they appeared at the time to the officer. 3. That if the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified Colonel Mitchell, even if the commander had abused his power, or acted from improper motives. The jury having found the facts against Mitchell, with a verdict for the value of the goods taken, the court affirmed it.

The reason of this rule of public law is obvious. An act of a nation is not the act of its agents in their private capacity, but in obedience to the will or command of the government. An officer in whom a military and civil authority is vested, as the Captain-General of Cuba, or a commanding general in a conquered country during war, has a large discretionary power of military and civil government, and few cases can arise where any official act of such officers can furnish a ground of action in any foreign or domestic tribunal. Where they act despotically or erroneously, no action will lie against them for official acts if within the limits of their governmental or military powers. (*Ib.*)

SEC. 9. Nations are responsible for their laws that in-

fringe the rights of other governments on the high seas, or which violate unjustly the immunity of the person or property of foreigners within their respective territories, whether stipulated by treaty or guaranteed by national comity, which is founded on the golden rule.

SEC. 10. Neutral nations, as a general rule, it seems, are bound to restrain their citizens and others within their territory, from making contracts or advances there to aid a foreign people or State to carry on a war against a nation with which such neutral country is at peace. The Supreme Court of the United States, in *Kennett and others vs. Chambers*, on appeal from the United States District Court of Texas, intimated this opinion in their decision. (14 *How.* 38, 44.) *Kennett* and others, at Cincinnati, Ohio, made a contract with the Texan General Chambers, for the conveyance of a large tract of Texan lands for advances made and to be made, at Cincinnati, to Chambers, to enable him to raise volunteers to carry on the Texan war of independence against Mexico, with which latter power our republic was at peace and had a treaty of amity and commerce. The contract was in 1836, and the independence of Texas was not admitted until 1837 by the President of the United States. A bill was filed to compel a specific conveyance of the Texan land so contracted and paid for in the United States. The court held the contract illegal and void, and refused to enforce it. The court, in the conclusion of their opinion, say: "We have given these extracts from the public documents, not only to show, that in the judgment of our government Texas had not established its independence when this contract was made, but to show, also, how anxiously the constituted authorities were endeavoring to maintain untarnished the honor of the country, and to place it above the suspicion of taking any part in the conflict.

“This being the attitude in which the government stood, and this its open and avowed policy, upon what grounds can the parties to such a contract as this come into a court of justice of the United States, and ask for its specific execution? It was made in direct opposition to the policy of the government, to which it was the duty of every citizen to conform. And while they saw it exerting all its power to fulfil in good faith its neutral obligations, they made themselves parties to the war by furnishing means to a general of the Texan army for the avowed purpose of aiding and assisting him in his military operations.

“It might, indeed, fairly be inferred from the language of the contract and the statements in the appellants’ bill, that the volunteers were to be raised, armed and equipped within the limits of the United States. The language of the contract is:

“‘That the said party of the second part, (that is, the complainants,) being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming and equipping volunteers for Texas, and is in want of means therefor.’

“And, as General Chambers was then in the United States, and was, as the contract states, actually engaged in raising, arming and equipping volunteers, and was in want of means to accomplish his object, the inference would seem to be almost irresistible that these preparations were making at or near the place where the agreement was made, and that the money was advanced to enable him to raise and equip a military force in the United States. And this inference is the stronger because no place is mentioned where these preparations are to be made, and the agreement contains no engagement on his part, or proviso on theirs, which prohibited him from

using these means and making these military preparations within the limits of the United States.

“If this be the correct interpretation of the agreement, the contract is not only void, but the parties who advanced the money were liable to be punished in a criminal prosecution for a violation of the neutrality laws of the United States. And certainly, with such strong indications of a criminal intent, and without any averment in the bill from which their innocence can be inferred, a court of chancery would never lend its aid to carry the agreement into specific execution, but would leave the parties to seek their remedy at law. And this ground would of itself be sufficient to justify the decree of the district court dismissing the bill.

“But the decision stands on broader and firmer ground, and this agreement cannot be sustained either at law or in equity. The question is, not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution, but whether such a contract made at that time within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

“The intercourse of this country with foreign nations, and its policy with regard to them, are placed by the Constitution of the United States in the hands of the government; and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war; and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order

or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For, as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass or the treaties into which they may enter within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act or enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he cannot claim the aid of a court of justice to enforce it. The appellants say in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

“But it has been urged in the argument that Texas was in fact independent, and a sovereign State at the time of this agreement; and that the citizen of a neutral nation



may lawfully lend money to one that is engaged in war, to enable it to carry on hostilities against its enemy.

“It is not necessary, in the case before us, to decide how far the judicial tribunals of the United States would enforce a contract like this, when two States acknowledged to be independent were at war, and this country neutral. It is sufficient answer to the argument to say, that the question whether Texas had or had not at that time become an independent State, was a question for that department of government exclusively which is charged with our foreign relations. And until the period when that department recognised it as an independent State, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign State, before she was recognised as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department.

“This is not a new question. It came before the court in the case of *Rose vs. Himely*, 4 *Cr.* 272, and again in *Hoyt vs. Gelston*, 3 *Wheat.* 324. And in both of these cases the court said, that it belongs exclusively to governments to recognise new States in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.

It was upon this ground that the Court of Common Pleas, in England, in the case of *Dewent vs. Hendricks*, (9 *Moore's C. B. R.* 586,) decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign State in arms



against a government in friendship with England, and that no right of action attached upon any such contract. And this decision is quoted with approbation by Chancellor Kent. (1 *Kent's Com.* 116.)

“Nor can the subsequent acknowledgment of the independence of Texas, and her admission into the Union as a sovereign State, affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from events which afterwards happened.

“But it is insisted, on the part of the appellants, that this contract was to be executed in Texas, and was valid by the laws of Texas, and that the district court for that State, in a controversy between individuals, was bound to administer the laws of the State, and ought, therefore, to have enforced this agreement.

“This argument is founded in part on a mistake of the fact. The contract was not only made in Cincinnati, but all the stipulations on the part of the appellants were to be performed there, and not in Texas. And the advance of money which they agreed to make for military purposes was in fact made and intended to be made in Cincinnati, by the delivery of their promissory notes, which were accepted by the appellee as payment of the money. This appears on the face of the contract. And it is this advance of money for the purposes mentioned in the agreement, in contravention of the neutral obligations and policy of the United States, that avoids the contract. The mere agreement to accept the conveyance of land lying in Texas, for a valuable consideration paid by them, would have been free from objection.

“But had the fact been otherwise, certainly no law of Texas, then or now in force, could absolve a citizen of the United States, while he continued such, from his duty to this government; nor compel a court of the United States

to support a contract, no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with the subsisting treaties with a foreign nation."

RESPONSIBILITY OF STATES AND NATIONS FOR PRIVATE PROPERTY APPLIED TO PUBLIC USE.

SEC. 11. In all cases where a nation releases a just claim of its citizens on a foreign nation, or refers it to arbitration without the consent of the claimants, and they are denied a verbal or written hearing and argument, and the referee decides against it and it is lost, in such cases the government, thus releasing or occasioning the loss of valid claims of its citizens on foreign States, is equitably bound to its citizen parties in the amount so released or lost by its action. So the Court of Claims of the United States held in the case of the American privateer General Armstrong, illegally captured during the war of 1812, in a Portuguese harbor, by a British armed vessel. (*Monthly Law Rep.* for July, 1856, vol. 9, p. 137.)

The Constitution of the United States forbids the national government to take private property for public use without just compensation, and the court properly applied that doctrine to the case. And besides, it is just that such a loss should fall on all the American people, and not exclusively on the owners of the Armstrong. Our constitutional rule is one of natural equity and justice, and is applicable to all nations. This rule of compensating citizens for such ought to be carried into effect by all nations. If the ship, cargo, provisions or property is destroyed in war by a government officer to prevent the enemy from seizing them, the citizen owning them is justly entitled to payment out of the national treasury, and our national

Constitution provides for compensation for property taken for public use. (See, also, *Vattel*, B. 3, c. 2, § 7 ; B. 3, c. 15, § 232. 17 *Johns.* 52. 13 *Pet.* 338.)

If this is a duty, it ought to be promptly performed. The private claims of a citizen of one country upon the sovereign of another ought, when just, to be promptly enforced, and collected and paid over to the claimant. A great delay is equivalent to a denial of justice to its citizens holding such demands.

#### DESTRUCTION OF PRIVATE PROPERTY FOR PUBLIC BENEFIT.

SEC. 12. Though the destruction of the property of a person to stop a *crevasse*, a fire, or to serve other like purpose, may not fall within the principle of American law forbidding the taking of private property for public use, it seems to present a case within the equity of it.

Where one man's property is destroyed to save that of others, which that act preserves, the principle of salvage applied by the admiralty to periled vessels and cargoes at sea, giving an equitable *pro rata* on the property saved and brought into port, strongly applies. In salvage cases it is the application of a natural principle of equity and public policy which is followed by all civilized nations.

If one or more persons on land preserve the property of many by allowing the destruction of their property, or having it done by others, to prevent the overflow of many plantations, or part of such a city as New-Orleans, or wide-spread devastations by fire, an apportionment among the parties benefited, in the ratio of their benefit of such loss, seems as just as an allowance of salvage to salvors, or an assessment upon a man's real estate for a street or park, opened by a municipal corporation for the improvement of a city, and which adds largely to the value of the adjacent property.

This general principle, founded in natural equity, ought to find place in every code of municipal law.

The destruction of a vessel and cargo by a Phœnician owner, by voluntary shipwreck, to prevent a Roman vessel from discovering the Phœnician trade in tin to Cornwall, in England, was considered as done for the nation, and they were paid for out of the public treasury. As the Phœnicians, by concealing such voyages, monopolized that commerce, and as the voluntary shipwreck was for the purpose of concealing it from a Roman vessel that was pursuing her to discover her destination, the service was truly a public one, and justly entitled to national compensation.

#### REPRISALS, AND A NATION'S OBLIGATION TO PAY FOR THEM.

SEC. 13. So, if a nation issues an execution called *letters of marque and reprisals*, to pay its own citizens for their losses by the wrongful taking of their property by a foreign nation, and it is levied and collected out of the property of the citizens of the State committing the wrong, the treasury of such State ought to pay for such property as taken to pay a public debt. (*Vattel*, B. 2, c. 18, §§ 342—347.) Such reprisals may be made as a forced collection or satisfaction of a national debt or duty, and the debt may arise from the acts of citizens assumed by a State or nation, or of public armed ships, of public officers, courts of justice or police. It may be resorted to in every case where a nation refuses to pay a debt or perform a duty, after all other peaceful remedies fail. (*Ib.* B. 2, c. 6, § 74. *Wheat. Int. L.* P. 4, c. 2, § 15.)

Though reprisals are called a pacific remedy, we agree with De Witt, the Grand Pensioner of Holland, who said : “I do not see any difference between general reprisals and open war.”

## CHAPTER XII.

### TREATIES.

SEC. 1. In the early ages of the world, when nations esteemed all foreigners, their political rights and their property legitimate objects of capture and seizure, and when wars of mere conquest were carried on, and the conquered men, women and children were sold as slaves to enrich their conquerors, we hear little of treaties. Society was so little improved, and good faith to foreign nations so little observed, that the making of treaties would have been a useless ceremony in most cases. The Roman writers condemn Punic faith, but Grecian and Roman history teaches us that Punic faith was Grecian and Roman also. The piratical nautical expeditions of the Greeks, and the pillaging and enslaving of surrounding nations by the oligarchs of Rome, until their respective States, the proudest and most cultivated of the ancients, were self-destroyed by war, and by the effects of slavery and the annihilation of free labor, show us a state of political society too low for a general regulation of international relations by treaty.

Treaties are, in the main, public declarations to the world, by the parties, of the principles of public law practically applied to their international relations. Some treaties are temporary, however, and may often be deemed concessions by one State to another, when they would not be deemed declaratory of public law. But treaties regulating permanently the relations of two or more na-

tions upon any important subject, as maritime and neutral rights, oft repeated and long continued, and assented to generally by Christian nations, ought to be deemed treaties declaratory of the law of nations. As a treaty may be valid if extorted by an overwhelming military or naval force, the actual history of treaties shows many obtained by moral duress of nations that are not in harmony with the declaratory treaties above mentioned.

The American government, inspired by Franklin, Jefferson and John Adams, sought by treaties to improve maritime law. Our first treaty with Prussia had this object. This system of diplomatic policy has been steadily pursued by all our statesmen to this day. John Quincy Adams and Henry Clay, as well as other American statesmen, have distinguished themselves by noble efforts to build up a system of public law, equitable, peaceful, and consistent with national independence and prosperity.

SEC. 2. A treaty is a contract, in writing, between two or more nations, duly negotiated by the ministers or agents, and ratified by the authorities of each State, in the mode prescribed by the organic laws of each. No treaty, unless so ratified, can bind a nation. (*Wheat. Int. L. P. 3, c. 2, §§ 5, 6.*)

All nations may make treaties by their sovereigns, Presidents and Senates, or by their executive councils, as the constitution or laws of each shall direct.

A treaty, to be valid, must be made by the duly appointed executive organ of each contracting party, and must be, as to its provisions, within the powers conferred on the executives of each by their respective fundamental laws. As each nation acts by agents, upon principle no act of a national agent, transcending the authority given him by his own State, can be valid. The authority of executives and their ministers are, of necessity, limited by the organic laws of their respective States, and these

must be looked to for the purpose of ascertaining the binding effect of treaties.

In absolute governments the whole treaty-making power is vested in the monarch, and he may alien or mortgage part of his dominions, or do any act allowed by the usage of his government. But in constitutional States, where the assent of a Senate, Cortes or other body is required to the validity of a treaty by the elementary laws of a nation, every treaty must be so ratified to be obligatory on it.

SEC. 3. In the United States the executive power is vested in the President. (*Const. U. S.* art. 2, § 1.) But his treaty-making power is limited by the second section of the same article to such treaties as two-thirds of the senators present shall concur in, by a vote duly taken in the Senate. The restricted powers of the Senate, and the powers expressly conferred on Congress, create also a limitation of the treaty-making power of the President and Senate. The Constitution expressly declares that it is made by the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty for themselves and their posterity. The nature of this government, of necessity, prohibits the President and Senate, by treaty, from changing admitted State boundaries, or the constitutional distribution and exercise of State and national powers, as well as from aliening or mortgaging any part of the admitted territory of the respective States, as such act might transfer a portion of our citizens and territory to a monarchy, and thus defeat the union and free government intended to be enjoyed under our Constitution. This limitation is inherent in the Constitution of the Union. (1 *Calhoun's W.* 180, 203, 204.)

But our national government has settled boundaries and fishery rights in the cases of the Northeastern and the Texan boundary contests by treaties.

General Hamilton, as a member of the Cabinet of Washington, in reference to Jay's treaty, advised the President that the treaty-making power was plenary, and that a treaty, of necessity, and properly executed, superseded all State laws in conflict with it. (5 *Hamilton's W.* 121.)

It is now settled, that this treaty-making power may add foreign territory to our republic, and that it may also convert its inhabitants into American citizens, with their assent. It then becomes American territory, from which States may be formed and added to our Union.

It would seem, that where a national power is expressly conferred on Congress, that it would not be a proper subject for the treaty-making power, except so far as a concurrent power may be granted. (1 *Calhoun's W.* 203, 204.)

Where a treaty is made, and a law of Congress is necessary to give it effect, a concurrent power in that body exists by the Constitution, over the subject to be exercised, as Congress shall see fit. (*Ib.*)

All international treaties are covenants *bona fide*, and must be equitably and not technically construed. (2 *Philimore Int. L.* p. 79.) And the entire treaty and its object must be considered in explaining every part of it. (*Ib.* 87.)

The intention of the parties, the subject of the treaty, and the facts existing at the date of it, must all be considered in interpreting it. Partition treaties between States or nations claiming an interest in any territory, have for their object a division by some natural and fixed boundary, as a territorial line, with certain enumerated appurtenant rights, if any. Such was our treaty of 1783 with Great Britain, and our Oregon treaty with the same



power. The uncertainties of the former were adjusted and a portion of the line re-settled by the Ashburton treaty. Oregon was claimed by our republic to  $54^{\circ} 40'$  north, but by a compromise, wisely agreed to by Great Britain and our government, forty-nine degrees of north latitude was agreed on as the line, by the Oregon treaty of June 15, 1846; but as it would, if run straight to the Pacific Ocean, cut Vancouver's Island, it was agreed, that where the 49th parallel of north latitude intersected Puget's Sound, it should run on that parallel to the middle of the channel, and thence through the centre of the channel of the Sound and of Fuca's Straits, to the ocean. The main and deepest channel for sailing vessels passing through the Sound is some twenty miles or so wide, between Vancouver's Island and San Juan Isle, and is deeper than the Rosario Straits that run between the continent and San Juan or Bell Isle and other adjacent islands, and the boundary is a line drawn in the centre of the channel of the Canal de Haro, between San Juan and Vancouver's Island; and northeasterly it follows the centre of the same channel continued to the 49th degree of north latitude, and westerly the dividing line extends along the same channel in a direct line to the centre of Fuca's Straits, and thence to the ocean. The American claim  $54^{\circ} 40'$ , and the agreement on latitude  $49^{\circ}$ , to the middle of the channel between Vancouver's Island and the continent as the line, shows that the intention of the parties was simply to deflect the boundary from such centre on the parallel of  $49^{\circ}$  around the island, and continue it by Fuca's Straits to the ocean. Of consequence, San Juan and the other islands lying on the American side of such a line, belong to our republic.

The treaty makes the Straits of Fuca and all those of Puget's Sound free to the common navigation of British and American citizens. (8 *U. S. St. L.* 869.)

This treaty has given rise to another question of construction. It provides that the actual possessions of the Hudson Bay Company should be respected, and for the navigation of the Columbia River and certain branches, to accommodate this fur-trading company. This company will soon expire by the limitation of its charter, and then these temporary rights of possession of realty and of use of the river must determine by the fair construction of the treaty. The business of the company trading with the Indians and trapping for furs show that these provisions were, in their nature and effect, temporary. Large rights and permanent ownership are claimed by the company. Upon the expiration of the charter, as it existed at the date of the treaty, these rights seem to end by a necessary limitation. If the charter should be extended by the British parliament—an improbable event—it could not extend the company's rights in Oregon or in Washington territory beyond the original treaty stipulation.

The interpretation of the treaties of our republic with foreign nations and with the Indian tribes must be according to the legitimate and fair meaning of the treaties themselves, as they take effect, as part of our supreme law, as ratified by the Senate. In that form they are published among the laws of the Union, as part of the supreme law of the country; and no secret article or explanation of a treaty, agreed on merely by the President, or by an ambassador or minister of his appointment, can have any effect on a treaty of our Union. Hence, the protocol relative to our treaty of peace with Mexico, was of no effect, whether its interpretation was right or wrong. (*Am. Law Reg. & Mag.* vol. 2, pp. 282—284.)

The treaty-making power is general, but it is subject in our Union to constitutional limitations.

All questions of contested boundaries between two nations may be settled by treaty of the nations interested;

and such treaties incidentally annul all private titles derived from the nation without whose limits the lands lie, except so far as the treaty shall ratify or confirm them. (14 *Pet.* 14. 2 *Ib.* 306.)

Compacts between the States of our Union, made in respect to State boundaries and with the assent of Congress, have a like effect. (*Ib.*) In *Poole vs. Fleegeer*, (11 *Pet.* 209,) the Supreme Court of the United States say: "It cannot be doubted, that it is a part of the general right of sovereignty belonging to independent nations, to establish and fix the disputed boundaries between their respective territories, and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries." This is a doctrine universally recognised in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered by the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognised by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares, that no State shall, without the consent of Congress, enter into any agreement or compact with another State; thus plainly admitting that, with such consent, it might be done. The Supreme Court of the United States has power to decide all controversies between States of our Union, including those relating to boundaries. (12 *Pet.* 657.) Its decree has a like effect.

In *Lattimer vs. Poteet*, (14 *Pet.* 14,) the Supreme Court say: It is a sound principle of national law, and applies to the treaty-making power of the government, whether exercised with a foreign nation or an Indian tribe, that

all questions of disputed boundary may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional powers, neither the rights of a State nor those of an individual can be interposed.

SEC. 4. A treaty made by our President, and ratified by the Senate, must be such as they have constitutional power to make, as the treaty-making power has constitutional limits, though conferred in general terms. (1 *Calhoun's W.* 203, 204.)

Where a treaty does not execute itself, and legislation is necessary, such a treaty would be imperfect until legislation perfected it. (*Wheat. Int. L. P.* 3, c. 2, § 7.)

SEC. 5. In general, nations confer on their executives or on their legislatures the treaty-making power and the right of eminent domain, and these enable them to alien the public territory and other property for the national use and advantage. (*Ib.*)

Grotius, in his work on Peace and War, maintains that the people inhabiting a ceded territory, if unconquered, ought to consent to the cession in order to give it validity, by the law of nature.

SEC. 6. Treaties made under forcible coercion are valid by the law of nations, though in all codes of municipal law the rule is otherwise as to contracts of individuals. This is a rule of necessity, as all wars would be endless if a valid treaty could not be made, and terms of pacification ratified in a binding form.

Though a nation, while its sovereignty continues, cannot be deemed under duress so as to vitiate its treaties made by its treaty-making power, yet if the person or persons, President, king or consul, authorized by the laws of a nation to make treaties, become prisoners of war, they cannot, while in the power of the enemy, make a treaty binding on their country. Duress of a person

negotiating and signing a treaty would render it invalid, as it would not in any sense be a national contract. Santa Anna's treaty, in behalf of Mexico, made with Texas, while he was a prisoner there, was invalid and of this class. An instance of such a treaty, signed by a captive sovereign, occurred in a war between France and Spain some three centuries ago, and another in the time of Napoleon; his treaty with the King of Spain while in his power, and while Ferdinand and his father were in Napoleon's control, and not free to act. All these treaties were repudiated by the nations attempted to be bound by these unduly obtained, pretended national compacts.

SEC. 7. Treaties are of various kinds. Some may be called reviving, as well as treaties of peace. Such were several treaties renewing the treaty of commerce and navigation of Utrecht, of 1713. Transitory treaties, which are annulled by war, may be thus restored to full vigor.

SEC. 8. A treaty of guaranty has for its object to secure, to one or both of the contracting parties, some right, or privilege, or thing stipulated. Any State, whether an original party or not, may become a guaranteeing party. Our treaties, with reference to the neutrality of the Isthmus of Panama and to the ship canal from ocean to ocean, with New-Granada and Nicaragua, are of this sort, and other maritime nations are invited to become guaranteeing parties, and to have equal participation with our republic in the benefits of the canal. (2 *Phillimore's Int. L.* 70. *Wheat. Int. L.* P. 3, c. 2, § 12.)

Such guaranteeing treaty is binding, according to its terms, whether it prove effectual or not. (*Ib.*)

If in any case the stipulations shall conflict with a previous treaty, the party is not bound to perform it, but he ought to make reasonable satisfaction for non-performance.

This treaty applies only to existing rights and possessions at the date of it. (*Ib.* 324.) Such a treaty may

become inoperative if the condition of one party is changed essentially, and the other party shall elect to renounce it. (4 *Hamilton's W.* 365.)

SEC. 9. Another class of treaties of great importance, binding two or more nations, are what are called treaties of alliance, having common warlike operations for their object. These treaties of alliance are offensive or defensive. The last applies to wars, in fact, defensive, and where a war of aggression is actually first begun by a third State against the contracting party. It is offensive when the ally contracts to co-operate in making war on a given State, or against any nation with which the other may be at war.

Some nations have made treaties to aid despotic governments to reduce their people to subjection by foreign armies and navies, when driven to revolt by cruel oppressions, ecclesiastical and civil. The British king, George III., by convention, hired the Hessians, and sent them against our rebellious republic in the Revolution. Russia aided Austria to subdue Hungary, and the Pope has long kept down his oppressed people by French, Austrian and Spanish arms. These acts are not in accordance with the precepts of the Gospel, and unlawful. (See *Const. of Holy Alliance*, Appx.)

SEC. 10. An alliance may be eventual and defensive. Such a treaty was made between the United States and France in 1778. (8 *U. S. St. L.* 6.) This treaty, and all our treaties with France made prior to July 7, 1798, were on that day annulled by act of Congress, on account of repeated violations of the treaties by France, and her refusal, with indignity, to negotiate in reference to satisfaction for such wrongs. (1 *U. S. St. L.* 578.)

Though treaties of one nation with another continue notwithstanding changes in the form of government, yet the rule is accompanied with this qualification: If the

particular form of government discarded was the motive to the treaty, or if the change renders the alliance useless, dangerous or disagreeable to one of the parties, the latter may elect to suspend and finally annul the treaty, on the ground that it would not have made such a treaty with such a party as the new and changed government. (4 *Hamilton's W.* 365—368, 370, 371. *Vattel*, B. 2, c. 12, § 197, and *Grotius*, referred to by Hamilton.) General Hamilton's opinion was able and sound, and was adopted and acted on by Washington, and saved our republic from being involved in the long and destructive European wars. Our country owes a heavy debt of gratitude to Washington and Hamilton.

General Hamilton held, that as to debts and pecuniary obligations, they were to be paid to the government *de facto*. (4 *Hamilton's W.* 381.)

These principles, General Hamilton, as one of Washington's cabinet, applied to the relations of our republic growing out of our mutually defensive and guaranty treaty of alliance with France of 1778. He advised the President, that the treaty on this ground might be suspended and finally renounced by our republic, owing to the violent and bloody substitution of a new government in place of the beheaded king, with whom the treaty was negotiated, and the general aggressive and warlike movements of the provisional French government. He also held, that by the law of nations, the aggressive wars of France were not the *casus fœderis* contemplated by this defensive treaty, and that it imposed no obligation on the United States to become parties to such wars. (*Ib.* 382—391.)

It was upon these principles of public law, accompanied with the fact that Louis XVI. was our benefactor, and that the contest for rule was a domestic one, as between his friends and opponents, that the United States, by President Washington, declared their neutrality during the



wars growing out of the French Revolution. Aggressions upon American rights by the revolutionary French governments finally induced Congress to annul the treaty of 1778, and all others made with France prior to July 7, 1798. (1 *U. S. St. L.* 578.) The wrongs and insults of France well warranted our annulment of the treaties. (See *Life and Writings of De Witt Clinton*, pp. 286, 287.) No such treaty will, probably, be made by our republic for the future, as its real object was to secure the independence of the United States.

Treaties may also be offensive and defensive; but no treaty can bind a nation to assist another in a war manifestly unjust. (*Wheat. Hist. L. N.* 325.) The reason is, that it is to do an unlawful thing, and all such contracts, by every system of jurisprudence, are held void. No nation has a right, by the law of nature, to engage in any but just and necessary wars.

When our Congress, or the treaty-making power of a nation, annuls a treaty, it ceases to form a part of the municipal law of the annulling country, and, of course, becomes wholly void. (2 *Curtis' C. C. R.* 459, 460.) Such an annulling act is well authorized when the other party refuses or omits to execute a treaty agreeably to its fair interpretation. The annulling of the French treaties was a just and proper act, and our American Congress will not fail to relieve our republic from any treaty that any foreign power may evade or fail to execute in good faith.

SEC. 11. Subsidy treaties are those that stipulate certain aids of men, money, arms or ships, the party furnishing the same remaining neutral. It is said that in this case the men, money, arms and ships are the only part of the nation deemed hostile. (*Wheat. Int. L. P.* 3, c. 2, § 15.) This cannot be the true rule of public law. As well might it be said, if a third person hand his cane to one of two.



combatants to strike the other with, that the cane is the only hostile thing, and not the man who furnished it. The common sense of the case is this: every nation is party to a war that furnishes, pursuant to treaty or otherwise, military subsidies to either party to carry it on.

SEC. 12. Treaties of commerce usually stipulate for free intercourse between the contracting nations, ingress, egress and domicil, protection of person and property. Such treaties confer absolute rights of intercourse, trade, residence and protection, according to the tenor of such treaties liberally construed; and neither party has a right, upon the ground of caprice or suspicion merely, to deprive any citizen or subject of the other of such privileges; nor can any lawful act, declaration or publication, done or made in a foreign country, and lawful there, be made a ground of exclusion of the trade, or of any citizen of such country a party to a treaty of commerce.

National comity confers substantially the same rights and imposes the same duties upon nations.

Nor has a nation a right to do any act to a foreigner of a friendly nation in violation of freedom of commerce, such as violating his correspondence, stopping his foreign papers, subjecting him to expensive or vexatious regulations, &c.

SEC. 13. The same rules of interpretation should be applied to treaties as to other contracts. (14 *Pet.* 11. 7 *Ib.* 86—88. *Wheat. Int. L.* P. 3, c. 2, § 17. 8 *Wheat.* 490.)

Treaties take effect from their date, unless a different time is fixed by them, though the exchange of ratifications is long subsequent. (1 *Kent's Com.* 5th ed. 169, 170. 5 *How.* 177, 188. 9 *Ib.* 289.) When duly ratified, they have a retro-active effect, and defeat all grants of public domain by a ceding State, of part of a territory ceded by treaty between its date and ratification. (9 *How.* 289. 12 *Ib.* 47.)

In the case of *Davis vs. Police Jury*, (9 *How. R.* 280—289,) it was held by the Supreme Court of the United States, that all treaties, when ratified, relate back, and take effect as of their date, so that grants of land, ferry franchises, or other rights in or appurtenant to any territory ceded by a treaty, if made after the date of the treaty, but before the delivery of possession, are illegal and void. In this case the grant of a ferry franchise to a land-owner on the bank of the Mississippi, after the 1st of October, 1800, the date of the treaty of St. Ildefonso, by which Louisiana was retroceded to France, was held illegal and void.

SEC. 14. A treaty containing stipulations in violation of an existing treaty made by one of the parties with another power, is, *pro tanto*, illegal, and the other contracting party may, at his election, annul the whole treaty, or demand satisfaction for the illegal part, and consider the residue binding. (*Vattel*, B. 2, c. 12, § 165. 2 *Pet.* 235. 5 *Hamilton's W.* 111.)

So, upon principle, a treaty made in violation of national rights, secured by the law of nations to a nation not a party to it, is void between the contracting parties, on the same ground that an agreement by two persons to rob a third is illegal and void. Such was the secret treaty made in 1670, between Charles II. of England and Louis XIV. of France, to conquer and partition Holland, to establish Catholicism in England, and make King Charles absolute. (*Mod. Br. Es. Phil.* ed. 388, 389.) All such treaties are void, as no government can lawfully bind itself to do a clear national wrong.

SEC. 15. Some treaties are, in their nature, partition treaties. These divide territories, fisheries and other rights appurtenant, and the portion so assigned to each is henceforward the permanent territory and property of the contracting parties; and a subsequent war between the parties does not, *ipso facto*, divest such vested jurisdiction

and property, with fisheries and other appurtenant rights. (2 *Wheat.* 261. 8 *Ib.* 494.) Our treaties with Great Britain of 1818, 1842 and 1846, relating to the partition of Oregon, and to our northern boundary and the fisheries, were all original or complete partition treaties. (8 *U. S. St. L.* 248, 572. *U. S. Sess. L.* 1848, 260.)

If an alien acquires a title legally, under a treaty, its expiration does not divest him of it. (2 *Wheat.* 261.)

SEC. 16. Treaties that are executory ought to be performed in good faith, according to their true intent and meaning. Some executory stipulations are permanent in their nature, and remain binding, notwithstanding subsequent wars. Such are all provisions made in contemplation of war: such are the 21st and 22d articles of our treaty of peace with Mexico, of 1848, stipulating, in case of war, to exempt from the effects of war non-combatants upon land; and providing that fields shall not be wasted, nor houses or property be destroyed in case of invasion; and that if private property is taken for the use of an invading army, it shall be fairly paid for. Such is the 10th article of our treaty with Great Britain, of 1794, and the 9th article of our convention with France, of 1800, (1 *U. S. St. L.* 122, 182,) stipulating for the mutual security of private debts, and funds in public and private banks, from confiscation in the event of war. (8 *Wheat.* 444.)

Transitory executory provisions of treaties are annulled by war as new relations arise, and a new contract is necessary to regulate them. (8 *Wheat.* 492—494. 7 *Pet.* 51. *Wheat. Int. L. P.* 3, c. 2, §§ 9, 11.)

In the United States, all treaties that require no legislation by Congress, are executed ones, and the supreme law of the land; but such as require legislation are executory, and require an act of Congress to enable our courts to execute them. (12 *Pet.* 746, 747.)

SEC. 17. Any provision of an executory treaty may end

by its own limitation, by a performance of the parties contracting, or by a total change of circumstances, rendering it inapplicable. (*Wheat. Int. L. P. 3, c. 2, § 10.*) One party to it may repeal it for violation by the other party, and refusal to perform it. (*2 Curtis' C. C. R. 457, 460.*)

SEC. 18. Treaties may determine by the destruction of either nation; by the loss of its nationality by conquest, or by the cession of its sovereignty to another nation. By the cession of the sovereignty of Texas to the United States, all her treaties with foreign nations came to an end. (*Vattel, B. 3, c. 14, § 213. Wheat. Int. L. P. 1, c. 2, §§ 7—9; P. 3, c. 2, § 10.*)

A family treaty, or one founded on any thing that, by a change of circumstances, becomes inapplicable, ends. (*Ib.*)

A treaty may be changed, also, by new and repugnant stipulations between the parties. (*8 Wheat. 495.*)

SEC. 19. The termination of a treaty by war, or by its own limitation, does not divest rights to realty or personalty already legally vested at the termination of the treaty. (*8 Ib. 493. 10 Ib. 189.*)

SEC. 20. After a treaty is ratified, if a physical or moral impossibility arises to performing its stipulations, it ceases to be obligatory upon the contracting nations. If either party has received a consideration for the doing of the thing that has become impossible, it must be restored. These are rules of natural equity, and have the sanction of Grotius and other civilians, and of all municipal systems of law and equity. The same rules apply if there was an error in a material fact; as it may well be presumed, that if the facts had been correctly known, such a treaty would not have been made. (*Wheat. Int. L. P. 3, c. 2, § 5.*)

SEC. 21. If either contracting party repeatedly violates a treaty, and refuses satisfaction when demanded, the other party may elect to declare it void, or may allow the

treaty to stand, and demand satisfaction for the violations of it. This proceeds on the just and equitable principles that a party refusing to perform a contract loses the benefit of it. On this ground, Congress, in July 7, 1798, by an act, declared our treaties and consular convention with France abrogated, and no longer part of the law of the United States. (1 *U. S. St. L.* 578. 8 *Ib.* § 12.)

The wrongful acts of France fully justified the act of Congress.

SEC. 22. Treaties, to be valid, must be made by the existing executive authorities of a nation, and, when so concluded, they bind the nation. An executive or king actually displaced and *de facto* out of power, cannot make a treaty.

SEC. 23. Internal changes in the character of a government by revolution or by a peaceful change of constitution or form of government, has no effect on treaties with foreign nations, so long as the contracting nation retains its nationality. (*Grotius on P. & W. B.* 2, c. 9, § 3. *Vattel*, B. 2, c. 14, § 215, *The Federalist* ed. 1818, p. 617. *Wheat. Int. L.* P. 1, c. 2, § 7. 1 *Kent's Com.* 5th ed. 167.)

If the change makes the alliance useless, dangerous or disagreeable to a contracting party, the latter may elect to renounce the treaty. (*Ante*, § 10, and 4 *Hamilton's W.* § 365.)

SEC. 24. Certain national agreements are national contracts, *quasi*; such as agreements of military or naval commanders in time of war, within the sphere of their respective duties; and they are deemed obligatory on the good faith of a nation, without ratification. Such agreements ought not, however, to assume to regulate matters of permanent arrangement, and should be strictly confined to military objects, as the national executive or treaty-making power alone has authority to bind the nation in

national matters. Of this class of military agreements are special licenses, cartels, armistices and capitulations. These do not ordinarily require ratification. (*Wheat. Int. L. P.* 3, c. 2, §§ 1—5.)

SEC. 25. Treaties, to be valid, must be ratified by the executive, or executive and Senate, or other department in which the fundamental law of a State has vested it.

SEC. 26. Treaties of peace are among the most important national compacts. War is declared by a nation by its king, emperor, consul, executive or legislative body or department in which the fundamental law of the particular nation has placed this high power. The power to make peace must also be exercised by the national organ to which that law confides it. These powers are differently deposited in different States and kingdoms. In the United States the power to make war is vested in Congress; (*Const. U. S.* art. 1, § 8;) and the power to make a treaty of peace belongs to the President and Senate. (*Ib.* art. 2, § 2.)

The Supreme Court, in *Foster and Elam vs. Neilson*, (2 *Pet.* 314,) says, that a treaty is, in its nature, a contract between two nations—not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of Congress, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must

execute the contract before it can become a rule for the court. (See 12 *Pet.* 745—747; 5 *How.* 177, as to treaties for extradition of foreign fugitive criminals.)

All private rights of property secured by a treaty of peace are objects of judicial cognizance and protection. (*Ib.* 8 *Wheat.* 464, 489. 10 *Ib.* 189.)

Nations, by their fundamental laws, may respectively limit the authority of the treaty-making power; but if there be no limitation, treaties of peace as well as others, may, by virtue of the nation's right of eminent domain, and of a general treaty-making power, alien any part of the public domain or property, and abandon for the public advantage all private claims and property of the citizens of either contracting party upon the other, or its citizens. (*Wheat. Int. L. P.* 4, c. 4, §§ 1, 2, 3.)

In the United States, if private property and private claims are abandoned by a treaty of peace, as was done by our treaty of peace of 1848 with Mexico, the Constitution requires Congress to pay our citizens for the private property so abandoned; and it has been done.

SEC. 27. A treaty of peace brings the war to a close, and cancels all the claims of the parties, which were the original grounds and causes of the war. A war cannot be revived for the same causes; but new national wrongs, though growing out of a principle that led to acts that produced the war, may justly be a ground for demanding satisfaction by all practicable, peaceful modes; and if they are unavailing, they may afford just grounds of war. Such injuries, however, ought to be serious, and the rights affected important.

A claim of abstract right is not, therefore, abandoned where the treaty of peace is silent as to it, but it merely discharges the claims for past acts, which led to the war. Our war of 1812 was declared against Great Britain for seizing, on the high seas, under her acts of Parliament and



orders in Council, many American ships and seamen, thus asserting the principle of a British municipal control over American neutral ships, and property on board of them, upon the high seas, under pretence of a belligerent right to stop all trade with France and her allies, and a right to the perpetual allegiance of her subjects, and to take them from American merchant ships and ships of war. It was a war for the freedom of the seas. The treaty of peace of 1814 (8 *U. S. St. L.* 218) was silent as to this great question. The peace cancelled American claims for the wrongful acts of Great Britain preceding the war, but left our republic the right to assert again, if an occasion shall occur, the freedom of the seas.

The collection of debts and claims of citizens of belligerent States, unconnected with the causes of the war, are suspended during the war; but debts are not extinguished by the peace, unless it is specially stipulated by the treaty. (*Wheat. Int. L. P.* 4, c. 4, §§ 3, 4.)

War contracts, as ransom bills, contracts by prisoners of war for food, clothing, subsistence, &c., or agreements and contracts made in the course of trade, under a license, may be asserted after peace. (*Ib.*)

SEC. 28. If in the course of the war any part of the territory of either nation has been conquered, and remains in possession of the conquerors at the close of the war, and the treaty says nothing about it, henceforth the title of the conqueror is perfect, and his title is confirmed as of the time of conquest. (4 *Wheat.* 254.) During the war the conqueror has a temporary and possessory right only to the conquered territory, but if the treaty of peace is silent as to conquered territory, or by express provision cedes it to the conqueror, then his title is perfect. (*Wheat. Hist. L. N.* 572. *Ante*, ch. 6, § 1.)

If the treaty of peace declares conquered territory restored to its original sovereignty, the possessory right



of conquest ceases, and it returns in its original title to its former owner. Any grant made to a third party by the conqueror, during the war, of any title to such territory, would be annulled by the treaty ; as the incipient title of the conqueror was not a completed title. If the treaty cedes the territory to the conqueror, or it is left in his possession silently by the treaty, then such grant would become valid.

As to movables, the title of an enemy is deemed good and complete after twenty-four hours' possession of booty on land.

Property captured at sea must be regularly condemned as prize of war, to preclude the original owner from restitution, on payment of salvage. If the treaty is silent, all personal property is left in the condition it was in at the date of the treaty, and the possessor at that time owns it.

If personalty taken during war, and without condemnation, be transferred to a neutral, and there be no recovery or recapture of it before peace, the title of the neutral becomes perfect by the peace.

SEC. 29. Where territory is temporarily conquered and occupied by the enemy, he exercises a temporary sovereignty over it that suspends the national laws for the collection of duties, taxes, &c., during the hostile occupation. A temporary allegiance to the conqueror is established, and the inhabitants are bound by such laws, and such only, as the enemy may choose to recognise and impose. From the nature of the case, say the court, no other laws could be obligatory upon them ; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. The effect of a treaty of peace restoring such territory revives the original jurisdiction as of the date of the treaty. (4 *Wheat.* 254, 255. *Wheat. Int. L. P.* 4, c. 4, §§ 4, 5, 6.)

SEC. 30. Treaties of peace generally adjust questions of

title to places conquered by express stipulations, and they may do it as to ships and property taken at sea or on land in possession of either belligerent. Our treaties of peace of 1783 and 1814 with Great Britain, and our treaty of peace with Mexico, have such provisions. (8 *U. S. St. L.* 80, 218. *Laws U. S.* 1848, p. 260.) All property in possession of either belligerent at the date of the treaty of peace and not agreed to be restored, remains the property of the conqueror. (5 *Hamilton's W.* 113.)

SEC. 31. A treaty of peace binds from its date when ratified. It ends hostilities, as of that time, unless it stipulates otherwise. Acts of hostility done after the treaty by the army or navy of either party, or its cruisers or privateers, are not criminal unless the actors are notified of the peace, but each State is bound to restore all property taken after the date or signature of the treaty. As all acts of hostility done by parties in ignorance of the treaty affords no remedy, civil or criminal, the nations to which they respectively belong must make full restitution unless the property has been destroyed or lost. (*Wheat. Int. L. P.* 4, c. 4, §§ 4, 5, 6.)

It is the opinion of Wheaton, that if a capture takes place at sea, after the signature of a treaty of peace, an action will lie against the captor for damages, even though he was ignorant of the treaty; and that he must look to his own government for indemnity. (*Ib.*) It seems to us that officers, and other military or naval persons, are not liable for such act, as it is national, and not private or personal. (17 *Johns.* 52, 53. 6 *Webster's W.* 268, 269.) The claim addresses itself to the political department.

SEC. 32. Where the treaty provides for restoration of things, they are to be returned in their original condition, natural wear, the effects of time and war excepted, unless it is otherwise stipulated. (*Ib.*)

SEC. 33. Treaties of peace ought to provide against the

recurrence of war and against its atrocities. Our treaty of peace of 1848 with Mexico, provides that, in all practicable cases, controversies between the contracting parties shall be referred to arbitrament, and that non-combatants on land shall be exempt from the effects of war, and that in case an invading army should seize any property for its use, it should be paid for. In our invasion of Mexico the American generals uniformly protected non-combatants and peaceful Mexicans from injury ; and private property was not taken unless fairly paid for. (4 *Stryker's Am. Reg.* 299.) This is a noble example, and worthy of imitation in all future wars and treaties of all countries. It is what the wise and good Franklin desired so earnestly, the discovery of a plan that would induce and oblige nations to settle their disputes without first cutting one another's throats. (*Sparks' Franklin*, vol. 2, p. 417.)

SEC. 34. All treaties to which our republic is a party, when ratified duly, form a part of the national law and are published with our acts of Congress. Secret treaties are a royal device to conceal for a time some iniquitous compact. These treaties are condemned by common sense and the principles of the golden rule, and they ought to be abandoned.

#### DISSOLUTION OF TREATIES.

SEC. 35. Now, upon the principles of the Gospel, which the sovereigns of Europe, including the Pope, by the Holy Alliance compact, declared to the world to be the basis of the law of nations, treaties, to be valid and enduring, must have a good object, and be equitable and right in their bearing upon the people of the treaty-making powers and foreign nations. All treaties that contravene these principles rest upon force and not on the benign doctrines

of the Gospel. They must pass away. Hence the treaties of Vienna, of 1815, the treaties of Napoleon I. with the Spanish princes and sovereign, with Prussia, Austria and other nations, by which their people and kings became tributaries and satraps, all rested upon force and not upon right, and they have all fallen by the sword. What the sword gives the sword takes away.

The same is true of a species of treaties called *concordats*, made between the Pope and Catholic kings in different ages, for the establishment over their people of a combined despotism, enslaving soul and body by the aid of the accursed, bloody Inquisition, and other inventions of priestly tyranny. These *concordats*, like the compact between Judas and the Jewish Sanhedrim for the betrayal and murder of the Saviour, fall within the severe condemnation of the above principle, are in direct contravention of the Gospel, and in their nature illegal and void. All such compacts, by which religious freedom is destroyed or infringed, and the rights, property and education of a people are given over to a tyrant priesthood, with its dungeons, inquisitions, tortures, fires and faggots, are inhuman, and no people are bound to obey them, and they must and will be swept away by the omnipotent power of an oppressed people enlightened by the Gospel.

The inherent right of all men to freedom and to be secure in their persons and property, and to self-government and protection and the pursuit of happiness, must be regarded by governments, kings and emperors, in all their treaties and compacts, or they will vanish like dew before the morning sun.

Formerly the Pope claimed and exercised the power of dissolving treaties, as well as of laying nations under excommunication. These are manifestly contrary to the Gospel, and are now repudiated.

The war of 1859, between Sardinia and France as allies

and Austria, and the rising of the Italians against the Austrian despotism, civil and religious, founded on treaties and *concordats* made without their consent, prove that no people will long submit to any compacts that deprive them of the right of self-government, of freedom, security and happiness. The partition treaties of Vienna rest upon force, and the sword will destroy them. No treaty or compact among nations ought to exist nor can long endure, that violates the golden rule of the Gospel.

DISARMING TREATY. INTERNATIONAL PEACE.

SEC. 36. Nations are bound to promote peace, good-will and the happiness of each other as much as individuals. Empires, monarchies and republics are all alike subject to this great moral duty. Great standing armies lead to wars, taxes, poverty, ignorance and desolation of finely cultivated countries, and cruel, grinding oppression and to national decay. The United States have a small army and navy, and our people devote themselves to the arts of peace, and maintain great armies and navies only in time of war; and, upon a call by the President, a powerful volunteer army and navy can at once be raised. Free Christianity, free institutions and general education, the strong hearts and ready hands of freemen are relied on to defend our republic from foreign aggression and domestic insurrection. Defensive wars only are approved by the people, though they may assume an invasive form. Our policy might well be applied to Europe by a congress of sovereigns, by a general disarming treaty, which shall fix the number of the army and navy of each nation in time of peace, at say, an aggregate of five hundred thousand men, to be apportioned among the different governments.

The following beneficial consequences would follow:

1. Constitutional governments would become general,

and freedom, religious and civil, would add to the comfort, wealth and happiness of the people.

2. General security and quiet would take the place of continued alarms and wars.

3. Taxes would diminish and the national debts might be reduced, and in most cases paid off, while general and free education could be given to the people of Europe.

4. The saving annually to Europe in war expenses, and the value of the labor applied to agriculture, manufactures and the mechanic arts, would be at least four hundred millions of dollars. In ten years the saving would amount to four thousand millions of dollars, and in twenty to eight thousand millions, besides interest. We hope the next European Congress will consider this subject and perfect such a treaty.

It is certain that the rulers of Europe, kings and emperors as well as parliaments, will have to establish freedom, civil and religious, a free press and general education. An enlightened public opinion will soon rule princes and people in every kingdom, and the happiness of the many must be the aim of all governments, instead of the interest of classes or of a select few.

The experiment of blocking the wheels of the car of liberty and progress has been fully tried in Europe and America. In 1775, George III. tried to stop the march of freedom in America, but Americans, aided by the gallant French, established our independence. The French Revolution aimed to organize a free government under Louis XVI. as king, adapted to the state of the people of France. The infatuation of the royal party, clergy and nobility, the amiable weakness of the well-meaning king, and foreign intervention by influence and arms, all conspired to bring down on erring royalty, nobility and clergy, a terrible punishment for the sins of those orders, which had reached, by the accumulation of ages, an oppressive

weight, and could not longer be borne. It was one of those retributions of Providence, self-inflicted by the guilty orders, which teach us that great oppressions produce great punishments, and that no governments are safe and permanent that disregard the freedom and prosperity of the people.

Another lesson has been taught us. The sovereigns, the nobles and the hierarchies of Europe combined to restore the Bourbons by arms to the throne of France. After countless defeats at the hands of Napoleon and the French, the allied armies, aided by treachery, expelled him from the throne and placed Louis XVIII. in his place. The legitimate party, led by Metternich, Talleyrand and Castlereagh, set themselves, after the Waterloo defeat, to make the existing despotisms permanent and sure. The chaining the great and greatly dreaded Napoleon to St. Helena, the organization of the Holy Alliance and the systematic attempt to arrest freedom and free institutions, aimed at this result. The treaties of Vienna, of 1815, had the same object. The plan has failed, and Prince Metternich lived to see the frail edifice of legitimacy fall in France, Belgium, Prussia, Sardinia, Lombardy and other States. Napoleon III., the Emperor of Austria and the Emperor of Russia have, we trust, forever discarded the unwise policy of Prince Metternich, and resolved to ameliorate the condition of their people, and devote themselves, for the future, to their prosperity and happiness. They cannot fail to see that force cannot long sustain legitimacy and despotism, but that all governments, to be secure and permanent, must conform to the interests, the happiness and the progress of the people.

A general disarming treaty will be a noble, royal and imperial movement towards constitutional monarchy and representative government, with its attendant blessings. (*Gardner's Moral Law of Nations.*)



SEC. 37. Napoleon I., in the plenitude of his power and greatness, looked to a general disarming and peaceful confederation of European nations. "At the peace of Amiens," said he, at St. Helena, "I believed, with the utmost good faith, that the lot of France, of Europe and my own, were fixed, the war being finished. I meant to devote myself to the administration of affairs in France; and I believe that I should have brought forth prodigies. I should have lost nothing on the side of glory but gained much on the side of happiness. I should have made the moral conquest of all Europe, as I was on the eve of accomplishing it by arms. I had a project for general peace by drawing all the powers to an immense reduction of their standing armies; and then, as intelligence became universally diffused, one might, perhaps, be permitted to dream of the application to the great European family of an institution like the American Congress, or that of the Amphictions in Greece; and then, what a perspective before us of greatness, of happiness, of prosperity! what a grand and magnificent spectacle! This agglomeration of European peoples must arrive, sooner or later, by the mere force of events. The impulse is already given; and I do not think, after my fall, and the disappearance of my system, that any balance of power will be possible in Europe, but this union and federation of the great nations."

The second Emperor of the Bonaparte dynasty, Louis Napoleon, has announced his intention of protecting Italians in securing their liberties free from foreign intervention. We trust that this great warrior and eminent statesman will execute his noble resolutions. We have full confidence in his good intentions to promote, as far as practicable, the above plan of the first Napoleon.



## CHAPTER XIII.

### WAR AND ITS USAGES.

SEC. 1. Nations have no common tribunal for the trial and authoritative decision of national controversies. Trial by battle and appeal thereby to God, as they were impiously called, have been disused under the enlightening influence of the Gospel, and all cultivated nations have a clear perception of the folly and injustice of submitting a question of private right to the arbitrament of the sword. The same correct view of national trial by battle is now becoming general among all the statesmen of Christendom. The only difficulty that nations experience in abandoning war and resorting to arbitrament, consists in organizing a tribunal of the necessary independence and ability to ensure a ready obedience of powerful nations to its decisions. The wonderful and rapid progress of commerce and industry in Europe and America, under the application of steam by land and water, and of the telegraph, with the increased moral power of Christianity, will soon make peace the settled policy of European and American nations. The United States have always, since the American revolution, been devoted to peace and industry, and so rapid has the progress of our republic been, that all nations see in it a practical illustration of the advantages of free institutions and of pacific pursuits. These causes promise a great and speedy improvement in public law favorable to peace. Believing, as we do, that

Great Britain, Russia, France, Prussia and the United States are to take the lead in carrying forward the benign principles of public law—that, with the consent of all Christian nations, the American principle—that private persons and property of belligerent nations shall be wholly exempt, by sea and land, from capture or molestation, will, in the course of half a century, be incorporated as part of the law of nations, we shall confine this part of our work to a concise statement of the present actual, though not generally approved, usages of war. The time must come when this Draconic code of war will rarely be consulted. Christianity, education, an enlightened self-interest and free institutions, all tend to peace.

SEC. 2. The right of self-defence belongs to nations as well as to individuals, and they may use force when and so far as may be necessary to prevent a threatened aggression or menaced injury, to protect their essential rights or procure redress for important national wrongs. (*Horne's Intr.* vol. 1, p. 163. 3 *Webster's W.* 207, 211. *Life and Writings of De Witt Clinton*, 272. *Wheat. Hist. L. N.* 339. *Wheat. Int. L.* 36, 37. *Vattel*, B. 3, c. 8, §§ 136, 137; B. 4, c. 4, § 43; B. 3, c. 3, § 26.) Nations may and ought to disregard small injuries, and may forbear to demand redress in cases not affecting important rights, unless an offending nation manifests a determined aggressive spirit. (See De Witt's Clinton's speech, worthy of a Christian statesman, on Spanish aggression in closing the Mississippi against American commerce, *Duane's Mis. Ques.* 39, 40.)

All justifiable wars rest on self-defence. They must, in effect, be wars of defence, though a defensive war may be carried on by invading the territory of the enemy. (*Vattel*, B. 3, c. 1, §§ 3, 4; c. 3, § 25; c. 13, § 201.) Such were our wars with Great Britain, of 1812, and with Mexico, of 1846.

The celebrated French philosopher, Pascal, a great and good man, about two centuries ago, thus expressed, in one of his works, his disapprobation of war: "Is there," says he, "any thing more ridiculous, than that a man has the right to kill me because he lives across the water, and his prince has a quarrel with mine, though I have none with him?" What a keen satire on the wars of England and France and all wars.

But so great are the evils of war that the necessity of self-defence must be obvious, and the national wrong important. Sir James Mackintosh, in his "Reasons against War with France," in 1793, asserts this doctrine. (*Mod. Brit. Es. Phila.* ed. p. 461.)

In 1792, and for many years after, a war was carried on by the allied powers against the successive governments of France, republican and imperial, to establish legitimacy there in opposition to the will of the French people. Of the numerous wars that desolated Europe from 1792 till 1815, the era of the fall of Napoleon, a large majority of them had this unjustifiable object. Napoleon's ambition was, doubtless, the cause of his war with Spain and of his invasion of Russia. It is difficult to find for the allies any sufficient cause of war in the adoption of a nominal republic, or in the election of an emperor by France; and the war to establish legitimacy, organized by the genius of the younger Pitt, is clearly as unjust as it was unavailing. Nor can any sufficient ground of war be found to justify Napoleon in his fatal attempt to subjugate Spain and place his brother on the Spanish throne, or to warrant his invasion of Russia. These two unjust wars destroyed and dethroned Napoleon, and gave legitimacy a short-lived rule in France.

Providence has so ordered that these unjust wars have neither established legitimacy in that country, nor given Spain to the Bonapartes, nor seated a descendant of the

great Napoleon upon the throne of France. All the splendid and cherished designs of the allies and of Napoleon, sought by these unjustifiable wars, have been defeated by the King of Kings.

In 1848 Louis Napoleon Bonaparte was elected President of the so-called French republic, and in 1852 he was elected Emperor of the French, and his imperial government was recognised by other nations. What a rebuke to unjust wars, and to national aggrandizement sought by them! The wide-spread dominion of Napoleon is gone, and France is restricted to her original limits. Legitimacy is not established, and it seems exiled forever from *la belle* France. The over-ruling providence of God is equally manifest in the great Eastern war, closed by the treaties of Paris of 1856.

The law of nations enjoins that all hostile acts should be confined to a necessary redress of past national wrongs, and to the prevention of future ones clearly menaced. (*Wheat. Hist. L. N.* 392, 393.)

As self-defence is the ground of every just war, the mode of carrying it on should be as humane as its object should be just. Hence, although a fortified town is attacked, it should first be summoned, and a reasonable time allowed for all non-combatants to depart, and they should be permitted to leave unmolested by the enemy. The distinguished American General, Scott, humanely did this prior to his bombardment and capture of Vera Cruz and the fortress of San Juan d'Ulloa. Generals Raglan and Canrobert are said to have summoned Sebastopol, given leave to non-combatants to depart within a given time, and requested flags to be hoisted on the hospitals. This humane proceeding is creditable to the gallant commanders of Britain and France.

Upon this principle the burning and sacking of towns ordinarily cannot be allowed. No Christian nation can

justify itself on the ground of necessary self-defence in burning towns, sacking and pillaging them, or in laying waste an enemy's country, or in burning or destroying commercial cities, or in employing, as allies, savages or slaves, who make war a system of assassination of men, women and children, and of burning houses, and of plundering and desolating the hostile country. Nor should works of taste, public edifices devoted to a civil use, fruit trees, vines, houses, bridges, canals and fences be destroyed or carried off.

While war is tolerated by Christian nations, it should at least be restrained, by the laws of humanity, within the limits of necessary self-defence and of the golden rule of the Gospel.

In the history of our republic our wars, all defensive truly, have been declared and conducted upon the above principles. Our enemies have violated them, and turned savages upon our peaceful people, destroyed property wantonly, and in many things disregarded the laws of civilized war, as above declared. It is to be hoped that Christian civilization will prevent such acts for the future.

SEC. 3. The universal practice of nations has given sanction to the levy of moderate military contributions by a victorious invading enemy. (*Vattel*, B. 3, c. 9, §§ 166, 185. *Wheat. Hist. L. N.* 406.) All military and naval seizures of the private property of non-combatant enemies are not, however, necessarily just or allowable. All unnecessary seizure or waste of private property, as the burning and laying waste of the Palatinate, with its cities and villages, by order of Louis XIV. of France, and the wanton murders and devastations in Piedmont by the Austrian army, in 1859, are at this day condemned as acts of atrocity; and public opinion condemns the military seizure, by Napoleon's Marshals, of the money of banks belonging to individuals, and other private property. Similar acts, perpe-

trated by other armies, are reprobated by the voice of Christendom. Napoleon himself, in one of his celebrated decrees, rightly claimed that, by the law of nations, all private persons, non-combatant, and their property, were entitled, of natural right, to exemption from military and naval capture and seizure. This doctrine our republic has long asserted, and now maintains. This seems to be just and humane, and the exceptions to this rule ought to have solid grounds to rest upon. (7 *Hamilton's W.* 346—351. 6 *Webster's W.* 427.)

SEC. 4. The right of an invading enemy, in case of necessity, to take provisions and other private property of an enemy, seems clear, provided compensation is made to the owners, upon the taking. Our treaty of peace with Mexico so provides. If a city or village has become a party to the war by any hostile act, a military contribution might be levied upon it proportioned to its offence against the invading army. So any individual enemy, whose conduct had been particularly hostile, might forfeit his immunity as a non-combatant, and justly become, according to military usage, the subject of such a contribution.

SEC. 5. As no more harm ought to be done in war by an invading army than is absolutely necessary to compel a just peace, the levy of military contributions on private property can rarely be justified. In our invasion of Mexico, the private property of the Mexicans was respected, and all supplies for our armies were fully paid for. (See *The Hon. Francis Baylie's classical description of Gen. Wool's celebrated march and invasion of Mexico, in Stryker's Am. Reg.* vol. 4, p. 249.) All American generals protected non-combatants and peaceful Mexicans from harm. (*Ib.*) Where, however, the whole people of a nation are called on to take arms, to form guerilla parties, and to exterminate invading armies, and all persons attached to them, whether armed or not, as was done by Mexico in the late

war with the United States, military contributions may justly be levied, as they were, by order of the President of the United States. If an entire population assumes the right of war, it must be subject to its severities. And in the case of Mexico and the United States, the olive branch had been presented by the victorious Americans to a prostrate foe, and a fair treaty of peace had been offered to the Mexicans, with a truce to complete it, and Santa Anna treacherously violated the truce and renewed the war. After this act, and a general arming of the whole population of Mexico, for the avowed purpose of exterminating the American invaders, the President justly ordered a levy of military contributions of three millions of dollars. A part of this sum only was levied when the armistice, that resulted in a treaty of peace, prevented the full execution of the President's order. In the levy, as far as it proceeded, the American generals apportioned the contribution among the States of Mexico within their power, and directed the Mexican administrative officers to levy and collect it in the usual way of imposing Mexican taxation. This partook of the nature of a governmental act, as the contribution was levied on that portion of Mexico temporarily conquered by our arms, and governed by our generals, as executive officers. A government temporarily sovereign is charged with the duty of protection, and may, during the continued occupation of a region by its armies, cause the local authorities to levy and collect taxes, and compel the payment of reasonable taxes as a compensation for the expenses of maintaining order and protecting the persons and property of the conquered district. (4 *Wheat*. 254.)

SEC. 6. When the seaports of a belligerent fall into the power of the enemy's army or navy, the conqueror may clearly temporarily levy duties on the commerce of such ports, according to his discretion. (4 *Wheat*. 254.) In



the war between Mexico and the United States, the Mexican ports having fallen into the power of our army and navy, the President ordered the levy of duties on the commerce of Mexico, as a means of reaching the national resources, while her commerce with all nations was suffered to continue. This power the President claimed and exercised as a military contribution. It was a most benign act towards the Mexicans, as well as in its bearing on the commerce of the world. It was a mitigation of the severities of war worthy of our republic.

SEC. 7. Under our Constitution and laws, this levy of duties in foreign ports by officers appointed by the President, according to a tariff decreed by him without the consent of Congress, is an anomaly. It looks like the ordinary action of a civil government, though it was a military contribution.

President Polk officially assigned the following reasons for his levy of military contributions on Mexico :

“ To the Secretary of the Treasury : Sir,—The government of Mexico having repeatedly rejected the friendly overtures of the United States to open negotiations with a view to the restoration of peace, sound policy and a just regard to the interest of our country require that the enemy should be made, as far as practicable, to bear the expenses of a war, of which they are the authors, and which they obstinately persist in protracting.

“ It is the right of the conqueror to levy contributions upon the enemy in their seaports, towns or provinces, which may be in his military possession by conquest, and to apply the same to defray the expenses of the war. The conqueror possesses the right, also, to establish a temporary military government over such seaports, towns or provinces, and to prescribe the conditions and restrictions upon which commerce with such places may be permitted. He may, in his discretion, exclude all trade, or admit it with-



out limitation or restriction, or impose terms, the observance of which will be the condition of carrying it on. One of these conditions may be the payment of a prescribed rate of duties on tonnage and imports.

“In the exercise of these unquestioned rights of war, I have, on full consideration, determined to order\* that all the ports or places in Mexico which now are, or hereafter may be, in the actual possession of our land and naval forces by conquest, shall be opened, while our military occupation may continue, to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon the payment of prescribed rates of duties, which will be made known and enforced by our military and naval commanders.

“With the adoption of this policy it will be proper to impose a burden on the enemy, and at the same time to deprive them of the revenue to be derived from trade at such ports or places, as well as to secure it to ourselves, whereby the expenses of the war may be diminished—a just regard to the general interests of commerce, and the obvious advantages of uniformity in the exercise of these belligerent rights, requires that well-considered regulations and restrictions should be prepared for the guidance of those who may be charged with carrying it into effect.

“You are therefore instructed to examine the existing Mexican tariff of duties, and report to me a schedule of articles of trade, to be admitted at such ports or places as may at any time be in our military possession, with such rates of duties on them, and also on tonnage, as will be likely to produce the greatest amount of revenue. You will also communicate the considerations which may recommend the scale of duties which you may prepare, and will submit such regulations as you may deem advisable in order to enforce their collection.

“As the levy of the contributions proposed is a military

right, derived from the laws of nations, the collection and disbursement of the duties will be made under the orders of the Secretary of War and the Secretary of the Navy, by the military and naval commanders at the ports or places in Mexico which may be in possession of our arms. The report required is, therefore, necessary in order to enable me to give the proper directions to the War and Navy Departments.

JAMES K. POLK.

“ Washington, March 23, 1847.”

The Supreme Court of the United States has had occasion to consider the legality of President Polk's order to levy duties in the conquered Mexican ports, its effect, and the construction of our tariff law of 1846 in its application to merchandise imported from such ports into those of the United States. The case was *Fleming and Marshall vs. Page*, Collector of the United States. (9 *How.* 603.) That eminent civilian, Chief Justice Taney, in giving the opinion of the court, said, that the question certified by the Circuit Court turned upon the construction of the act of Congress of July 30th, 1846. The duties levied upon the cargo of the schooner *Catharine* were the duties imposed by this law upon goods imported from a foreign country. And if, at the time of the shipment, Tampico was not a foreign port, within the meaning of the act of Congress, then the duties were illegally charged, and having been paid under protest, the plaintiffs would be entitled to recover in this action to the amount exacted by the collector.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were, undoubtedly, at the time of shipment, subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy, and the country was in the

exclusive and firm possession of the United States, and governed by its military authorities, acting under the order of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress.

The country in question had been conquered in war; but the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate, by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States; but his conquests do not enlarge the boundaries of the Union, nor extend the ope-

rations of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that when Tampico had been captured and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. For every nation, which acquires territory by treaty or conquest, holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States, while it was occupied by their arms, did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President, under which Tampico and the State of Tamaulipas were conquered and held in subjection, was simply that of a military commander, prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is

due from a conquered enemy when he surrenders to a force which he is unable to resist. After saying that our Mexican conquests had no effect on the limits of the United States, as existing at the declaration of war, he added, that every place beyond those limits was still foreign, nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.

The Chief Justice further declared, that there was no collector at Tampico acting under an act of Congress, but merely a military collector, acting as such, under the authority of the military commander, and in obedience to his orders; and the duties he exacted and the regulations he adopted were not those prescribed by law, but by the President, in his character of commander-in-chief. The custom-house was established in an enemy's country as one of the weapons of war. It was not established for the purpose of giving the people of Tamaulipas the benefits of commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico. It was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war.

The duties required to be paid were regulated with this view, and were nothing more than contributions levied against the enemy, which the usages of war justified when an army is operating in the enemy's country. The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognised in any port of the United States as the documents required by the act of Congress when the vessel is engaged in the coasting trade; nor could they exempt the cargo from the payment of duties.

The learned judge further stated, that our government had uniformly levied duties on goods imported from ter-

ritory ceded to our republic until an act of Congress passed extending our revenue laws over it, and that the practice had been sanctioned by the national courts. Speaking of the restoration of Tamaulipas to Mexico by the treaty of peace, he added that, certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

The Chief Justice declared, that there was no analogy between the power and authority of the English crown and that of our President, either as regards conquests in war, or any other subject, where the rights and powers of the executive arm of the government is brought in question. And that our own Constitution and form of government must be our only guide. And the court decided that goods imported from Tampico, into a port of the United States, were liable to duties. (9 *How.* 603, 614.)

This case, as well as the *United States vs. Rice*, (4 *Wheat.* 254,) show that in ports conquered and held temporarily by an invading enemy, the revenue laws of the country, as to such ports, are superseded by the military regulations for collecting duties during such enemy's possession.

The same court afterwards held, that California was conquered by the American arms from Mexico, and that the military and civil government there established by the President was lawful, and that duties there collected, during the period between the conquest and the extension of the acts of Congress to that territory by the collector of the executive, were legally collected. (16 *How.* 164.)

SEC. 8. It will be observed that the levy of duties on Mexican commerce, and of taxes upon her States temporarily held by our victorious armies, were substantially governmental acts of a supreme power, which gave security to commerce and protection to the Mexicans. It was not,

in fact, a taking of private Mexican property for the use of our army, but a levy upon the national treasury and resources of a people refusing reasonable terms of peace and madly bent on war.

SEC. 9. The taking of private property for the use of the army, accompanied with payment for it, was occasionally exercised by our generals; and this, as we have shown, is allowable, equitably, as well as by the usages of the most civilized nations. In the main, the supplies of our army in Mexico were fairly bought and paid for.

SEC. 10. As war ought not to reach non-combatants and their property, except in the cases above stated, the general rule may be properly affirmed, that private persons and property, not engaged in or used in the war, are to be exempted from it; while all the national resources and public treasury of a temporarily conquered country are properly subject to military seizure and confiscation.

SEC. 11. The general, nay, the universal practice of nations at war, has allowed the seizure of ships, merchandise and private property on shipboard, of citizens non-combatant, who belong to an enemy's country. This is one of the relics of ancient barbarism condemned by Christianity and the enlightened spirit of the age. No reason can be assigned why a storehouse of an enemy merchant, its occupants and its merchandise, should be exempt from military or naval capture, while the ship, sailors and cargo of the same merchant at sea, or coming into port to unlade articles of ordinary commerce at such storehouse, are liable to capture and condemnation as lawful prizes of war. The rule of exemption of private property of non-combatants from the effects of war ought to be the same by sea and on land. This view of the subject is supported in an able report of a Committee of the House of Representatives of the United States, and by Napoleon's Berlin decree. It is the doctrine of reason



and humanity. The first treaty of the United States with Prussia lays down this rule as the international law of the contracting parties. President John Quincy Adams, in giving his instructions to our Ministers to the American Diplomatic Congress, proposed to be held at Panama, through Henry Clay, Secretary of State, instructed them to bring forward at the Congress, with a view to preserve peace on the American Continent, the proposition to abolish war against private property and non-combatants upon the ocean. After enforcing this principle by unanswerable reasons, the able Secretary adds: "This has been an object which the United States have had much at heart ever since they assumed their place among the nations." (*Am. Ann. Reg.* P. 2, p. 37, for 1827, 1828, 1829.)

SEC. 12. Some nations have asserted the right, also, of seizing and condemning, as lawful prize of war, the private property and merchandise of citizens of an enemy, when found on board of neutral vessels on the high seas; while it is conceded that a belligerent has no right to enter a neutral country and do a hostile act there, in reference to an enemy's property or otherwise. This practice, though quite general, has been often condemned by treaties, and it must be admitted that it has no ground of principle to stand upon.

The Sultan has shown respect for peace and liberality. In his declaration of war against Russia, in 1853, he refuses to consent to a Russian protectorate over the Greek population of Turkey, as inconsistent with national sovereignty, and he repels the Russian demand of it as an indignity to the Sublime Porte. He also charges Russia with unjustifiable invasion of Moldavia and Wallachia in time of peace, and pending the negotiations for settling all difficulties, and he orders the Turkish general to demand the evacuation of the territories within fifteen days, and if not done, the Sultan proclaims war; and in a spirit worthy



of honor and imitation, he thus concludes: "At the same time, the Sublime Porte will not consider it just to lay an embargo upon Russian merchant vessels, as has been the practice. Consequently they will be warned to resort either to the Black Sea or to the Mediterranean Sea, as they shall think fit, within a term that shall hereafter be fixed. Moreover, the Ottoman government being unwilling to place hindrances in the way of commercial intercourse between the subjects of friendly powers, will, during the war, leave the straits open to their mercantile marine." When a Mahomedan nation sets such a noble example, it is to be hoped that all belligerent nations will follow it. Such principles are worthy of the man who contributed a block of marble to the Washington Monument, with his roseate insignia, and an expression of his desire of amity with our republic, inscribed—a touching expression by the Mahomedans of their admiration of the Father of our country and the friend of universal liberty.

This Sultan, at the close of the war, in 1856, was appealed to by the American Minister at his court, to establish religious freedom and equality of political rights for all people in his empire; and by an edict, recognised by the treaty of Paris, he established this great American principle in place of the ferocious and atrocious doctrines of the Koran. This noble act has enrolled the name of this Sultan among the benefactors of mankind, and another stone, recording the great event, ought to be added to the monument of Washington.

#### WARS, CONQUESTS, TREATMENT OF THE CONQUERED, AND LIMITATION OF BELLIGERENT RIGHTS.

SEC. 13. The principal wars of late are the Mexican war with the United States, of 1846 and 1847; the Crimean war between Russia and Turkey, aided by her

allies, France, Great Britain and Sardinia; the Chinese war, waged by Great Britain and France against China; and that of 1859 between Austria and Sardinia, aided by her powerful and brave ally, France. To these may be added the war in India between the Hindoo and Mahomedan rebellious races and their British conquerors.

It seems, that in the past and present condition of the world, wars of ambition, of interest and of passion are inevitable, though the prophetic golden era of peace on earth and good will among men must come, when Christian civilization and the doctrines of the Gospel shall exert their full power and produce their natural effect, and inaugurate the reign of peace, justice and mercy. We are now in a transition period, and the great nations chosen to improve and civilize the world seem to be—1. The United States, by peaceful expansions over the British Possessions of North America, over Cuba, Hayti and the adjacent islands, and over all North America to the Isthmus of Panama. 2. The great Anglo-republic of Australia. 3. A future confederation of southern republics formed by emigrant colonizing Americans into one or two southern republics like ours, with the American language and free institutions. 4. Great Britain. 5. Russia; and 6. France. All these are maritime nations; but Russia, having a large territory and population dependent on the commerce of the Black and Mediterranean seas, seems destined to displace the decaying power of the Ottoman Porte, to occupy Turkey in Europe and Asia, and to extend her power and Christian civilization over Central Asia east to the Pacific and south to British India. France seems the appointed colonizer, ruler and civilizer of Egypt and of maritime Northern Africa, while Great Britain will probably cover all India and adjacent islands by her permanent dominion. Knowledge and Christianity will thus supplant ignorance and barbarism.

The duty of the publicist is to restrain and humanize wars and conquests, and limit belligerent rights by the benign principles of the Gospel. All needed national acquisitions ought, as far as practicable, to be secured by fair cession and purchase. But in case of invasions of an enemy's country, the example of the Americans in Mexico should be followed.

The American invading armies not only respected and protected all peaceful Mexicans and their property, by orders of the distinguished American generals, Scott, Taylor, Wool, Persifer Smith, Worth and others, but all wrongs were promptly inquired into and punished. Such was the protection and security of the Mexican capital and provinces, under the rule of the American generals, that when peace was agreed on and our army withdrew, it was followed by the regrets and gratitude of the best portion of the Mexican people. And what is remarkable, this conduct was continued to the end of the war notwithstanding Mexican treachery, and although Santa Anna, the President of Mexico and commander-in-chief at the battle of Buena Vista, ordered his twenty thousand veterans to give no quarter to the four thousand six hundred Americans, who proved victorious over his armed host. It is to be regretted that Austria, in her unjustifiable invasion of Sardinian territory in 1859, did not imitate American example. The Americans purchased Mexican provisions at fair prices; the Austrian armies pillaged, plundered and devastated Piedmont, its peaceful inhabitants, its fertile and beautiful plains.

Private property and peaceful persons, by sea and land, of the belligerents, ought to be held sacred, respected and protected. This is the true rule of the law of nations.

The treatment of a conquered and annexed people is an important matter. Philip II. of Spain supposed the conquest of the Moors divested them of all personal and

property rights. Acting on this principle, that savage, monster king, and the grand Jesuit, presiding over the accursed Inquisition of Spain, united their terrible despotisms to compel the unhappy descendants of the victorious Saracens to give up their language, their religion, their property, their laws and customs, and forced them into a rebellion, conquered, killed and exiled them. Their vine, mulberry and olive-clad hills and valleys, their silk culture, their agriculture and manufactures, all were swept away by royal and priestly despotism, and desolation covered the rich, populous and industrious Moorish provinces of Spain. The Inquisition and Philip have, by these and countless other deeds, earned and will receive the perpetual execration of mankind.

The prior exile of large numbers of the conquered Saracens, by Spanish cruelty, proceeded on the same savage principle, that a conquered people have no rights. Spain has suffered severely by this atrocious policy, as unwise as it was cruel.

The great controlling principle, as to the acts of hostility that a just war allows, requires only reparation for the past and security for the future, by a just and durable peace. As all acts of atrocity and cruelty in war tend to prolong it and prevent peace, always producing savage retaliations, they are prohibited by reason and humanity. The laying waste an enemy's country, the sacking, burning or pillage of towns or cities, the use of poison or poisoned weapons, the unnecessary killing or wounding of an enemy, the ill-treatment of prisoners, the killing of an enemy when he can be captured without probable danger to the captor, the refusal to exchange prisoners, and the use of unusual and savage implements of war, are within the prohibition; upon the same principle, the violation of any armistice or military compacts, of a flag of truce or of a safe conduct, are also prohibited.

SEC. 14. The principle of self-defence, the basis of all just wars, limits the right of conquest of an enemy's country. To compel reparation for serious national wrongs done by an offending State, the injured nation may in war invade the territories of the other, and hold them until adequate indemnity for past injuries and security against their repetition shall be given, and a solid peace be secured by treaty. When full reparation for past wrongs shall be made or tendered by the offending nation, and the reasonable expenses of enforcing satisfaction shall be paid, a victorious invader is bound to make peace and give up all conquests. If an enemy refuses peace, and persists in refusing adequate satisfaction to a victorious, rightful invader, the latter may seize a portion of the country sufficient to satisfy the just demands of the invading nation, and the expenses of obtaining such payment, and hold it as a pledge, and appropriate its revenues and customs, until the offending government shall consent to make satisfaction and agree to a solid peace. And, if satisfaction be unreasonably delayed, the conquered territory may be incorporated with the victorious State.

. SEC. 15. A nation refusing to negotiate an equitable treaty of peace, and pushing on a savage war, as Santa Anna did, after General Scott offered an armistice and honorable peace, may be properly treated with rigor. Hence, after the capture of Mexico by the Americans, the President was well warranted in ordering such military contributions, to the amount of \$3,000,000, upon the Mexican States in our power. But still a victorious invader should give up his conquests, even after high provocations, if the enemy offers to do justice and make a solid peace. This the United States did with Mexico, and retained no conquests, but merely purchased New-Mexico and California, as a means of obtaining satisfac-

tion for our just national claims; and our generals, Scott and Wool, stopped the levy of the military contributions.

SEC. 16. We have endeavored to show, that a war to be just must be, on principle, defensive; and that the right to use force in war is limited by the right of self-defence to certain means of hostility.

SEC. 17. Our republic has earnestly endeavored at all times to maintain peace and to incorporate in the law of nations the humane and just principle of the exemption from capture in war, by sea and land, of all private property, and of all persons non-combatant.

SEC. 18. In anticipation of war, nations may lawfully seek to coerce satisfaction for national wrongs, and thus avoid the horrors of war. An injured nation may lay an embargo on the ships of an offending State, and detain them in order to obtain reparation. It is said, that in the event of a declaration of war, the ships and cargoes may be confiscated. (5 *Rob. Ad. R.* 246. *Wheat. Int. L.* P. 4, c. 1, § 1.) Such acts, however, we deem violations of good faith towards innocent merchants trading peaceably, and ought not to be allowed. (7 *Hamilton's W.* 346.) Even a temporary detention of merchant ships and their cargoes, and other private property, invited to enter the ports of a nation for commerce, can hardly be justified in this enlightened age. It is a custom of a barbarous age, and based on the anti-commercial and savage spirit of an era when fraud and force were deemed legitimate principles of national action. All interference with private persons and property, drawn to a country by commerce, or legally acquired there, except to fix a reasonable time for them to depart and withdraw it, on the approach of hostilities, are forbidden by hospitality, justice and humanity. (7 *Hamilton's W.* 346—351.)

SEC. 19. It is also said, by writers on public law, that if territory be in dispute between two nations, either may

in its discretion take exclusive possession of it. This ought not to be done, unless the nation interposing a claim refuses either to negotiate or arbitrate the matter in dispute. For as long as a peaceful mode of adjustment remains, a nation is bound to forbear an exclusive occupation of the contested territory, as that would naturally lead to war. Great Britain and the United States each forebore to deprive the other of its possession of the disputed territory along our northeastern boundary and in the vast Oregon territory, and, by negotiation, after unsuccessful arbitrament in the former case, settled both territorial disputes by treaty. A similar attempt to adjust with Mexico the western boundary of Texas, after its annexation to the United States, as well as our claims for Mexican spoliations, was made by President Polk. Mexico, in a hostile spirit, by a letter of General Almonte to our Secretary of State, March 6th, 1845, broke off all diplomatic relations with the United States, and afterwards refused to receive Mr. Slidell, our envoy-extraordinary, sent to Mexico to re-open negotiations, and to adjust, amicably, all national differences; and President Parades announced a determination to invade Texas, which was then a part of the United States, and at the time of its annexation had been recognised by Great Britain, France, Belgium and the United States as an independent nation, and which, for eight years, had been free from every Mexican invader. In this state of affairs, our President ordered General Taylor to advance to the banks of the Rio Grande, and to advise the Mexican general that the movement was a pacific one, and that the settlement of the national differences were intended to be left to the governments of Mexico and the United States. In these measures President Polk showed an earnest desire for the preservation of peace, and his occupation of the Texian bank of the Rio Grande was clearly justifiable under the circum-



stances.. President Parades had ordered the Mexican army to invade and conquer Texas before General Taylor took possession. The Mexican troops crossed into Texas and made a sudden attack on the American troops, and thus forced the war upon our republic. The omission of Mexico to pay for spoliations on our commerce, long demanded by our government, her refusal to negotiate and settle all national differences between Mexico and our Union, and her commencement of hostilities on the disputed territory, well warranted the advance of our armies into the heart of Mexico. Our long line of victories over the greatly superior armies of Mexico, and the conquest of large portions of that country and its capital, seem like Providential inflictions upon the Mexicans for forcing a war upon the peaceful government of our Union. By the treaty of peace, Mexico made provision for payment of the spoliations on our commerce, by selling to the United States the conquered States of New Mexico and Upper California, which our republic generously bought at a full price, without compelling Mexico to pay the expenses of the war, as we had the power to do and might justly have done. Mexico, by the treaty, admitted the Rio Grande as the true boundary, as claimed by the United States. The origin and results of this war prove that nations ought to settle all questions of boundary by negotiation or arbitrament; and that the nation that forces a war upon another and refuses an amicable arrangement, commits a great national folly and wrong.

SEC. 20. A nation may retaliate upon another by applying to it the same rule of conduct which governs the other State. A nation may make reprisals upon the persons and property of the offending nation. (*Wheat. Int. L. P. 4, c. 1, §§ 1—4. Vattel, B. 3, c. 8, § 142.*) Unjust condemnation in the prize courts of a belligerent is good



ground for reprisals, according to Grotius. (*Wheat. Int. L. P. 4, c. 2, § 15.*)

As these measures lead directly to war, it is advisable to abstain from such acts if any hope of peace remains by negotiation, mediation or national arbitrament.

SEC. 21. The right of making war and of doing the acts above stated, resides in the supreme power of the nation. The right is sometimes delegated to the local government of distant possessions, as to the British East India Company. (*Vattel, B. 3, c. 1, § 4.*)

By the Constitution of the United States, (art. 1, § 8,) Congress is invested exclusively with the power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. All laws necessary to give full effect to this power may be passed by Congress. (*Ib.*)

Under reprisals, all public property, and such private movables or immovables as have not come into a nation's power on the public faith, may be seized to pay just claims of the nation or of its citizens, upon another refusing payment. (7 *Hamilton's W.* 346—351.) Letters of marque and reprisal are in the nature of a national execution for a debt.

SEC. 22. The usage now is for a nation declaring war to proclaim the fact at home, and proceed to hostilities; and when hostilities are thus commenced, each belligerent becomes equally entitled to what are called the rights of war.

SEC. 23. Property found in the country of a belligerent belonging to alien enemies, including debts and stocks, are not now generally considered subject to seizure and confiscation. The abstract right is said to exist unless restrained by treaty. It rests in the discretion of the sovereigns of belligerent nations. (8 *Cranch*, 110. *Wheat. Int. L. P. 4, c. 1, § 9.* 1 *Gallis*. 563.)

In the United States no such confiscations can take place without an act of Congress. (8 *Cranch*, 110. *Wheat. Int. L. P.* 4, c. 1, §§ 11—13.)

SEC. 24. The treaty of 1794, between Great Britain and the United States, stipulated, that neither the debts due from individuals of the one nation to individuals of the other, nor shares nor moneys which they had in the public funds, or in the public or private banks, shall ever, in any event of war or national differences, be sequestered or confiscated. Our convention of 1800 with France has a similar article. (8 *U. S. St. L.* 122, 182.) This is properly a permanent rule, and ought to be followed by all nations. The rule itself shows the sense of these nations which made it of the justice and policy of exempting private property on land from the operation of war and conquest. The Supreme Court of the United States have strongly laid down this principle as a rule of international law in the United States *vs.* Percheman, (7 *Pet. U. S. R.* 51, 86—88. See *Vattel*, B. 3, c. 13, § 190. 8 *Wheat.* 494.)

SEC. 25. By common consent, all private property on land ought to be considered exempt from capture. And, as before suggested, no distinction in reason exists between a merchant's warehouse filled with goods on the sea-shore, and his ships freighted with his merchandise a league and a half seaward. The moral sense of mankind will soon compel all Christian nations to abstain from pirating on private property and persons non-combatant, at sea as well as on land. The principles of the Gospel—the basis of public law—require that war by sea and land should respect private persons and property. (See *Holy Alliance*, Appx.)

SEC. 26. War places all the citizens of belligerent nations in hostility, though the war is carried on only by those having commissions or authority from the supreme

power of each State. No other persons are authorized to make war except in self-defence. (*Vattel*, B. 3, c. 15, § 224. 1 *Gallis*. 563. *Vattel*, B. 3, c. 5, § 70. *Griswold vs. Waddington*, 16 *Johns. R.* 448. *Wheat. Int. L.* P. 4, c. 2, §§ 8, 9.)

If the citizens of a nation, without a commission, capture a ship or vessel of the enemy, a condemnation may be demanded, in the prize court, of the captors for the use of government. (6 *Wheat.* 66. 10 *Ib.* 306, 310.) Though captors not commissioned by the government cannot make title to a prize *jure belli*, they may recover salvage for taking and bringing in the prize. (2 *Wheat. R.* 99, p. 7.) In the case of the *Dos Hermanos*, the court decreed an equal distribution of the proceeds of the prize between the United States and the captors, without deducting the captors' expenses.

SEC. 27. The salvage allowed to public and private armed vessels, carrying the commission of the United States, will be found in the acts of Congress. (2 *U. S. St. L.* 16, and n. 52, 53, 759, 760, and n. *a, b.* 10 *Wheat.* 310.)

In the case of the *Star*, (3 *Wheat.* 86,) the Supreme Court of the Union decided, that a ship duly captured by a British armed ship during the war of 1812, and condemned and sold to a British subject, and afterwards captured by an American armed vessel, was a lawful prize, on the last capture, as by the condemnation and sale she had become British property. The court said it was universally allowed, that at all events a sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign. And they refused to decree restoration to the original owner on salvage.

SEC. 28. As a consequence of war, all commercial intercourse between the citizens of belligerent States, ex-

cept that allowed by their governments, is prohibited by the usage of nations and by public law. (*Wheat. Int. L. P. 4, c. 1, §§ 13—17. 16 Johns. 453, 459. 1 Bos. & Pul. 350, n. 1 Rob. 196. 3 Wheat. 207. 7 Pet. 586.*)

SEC. 29. By war, a partnership between citizens of hostile States is dissolved at the declaration of it, and the remedy on all other contracts existing at the time, between such citizens, is suspended during the war; so that no action can be sustained by an alien enemy on them during the war in the courts of either belligerent. Nor can such alien enemies insure the property or trade of each other, or draw or accept bills of exchange, or remit funds in money or bills to the country of the enemy; nor can a merchant ship of a belligerent lawfully take a license from the enemy to trade without consent of the government of the owner of it. (*7 Pet. 586. 2 Wheat. 143. 2 U. S. St. L. 778, n. a. Wheat. Int. L. P. 4, c. 1, §§ 13—21. 16 Johns. 438, 469, 479. 6 Term R. 23, 28. 1 Kent's Com. 5th ed. 67.*)

Where alien enemies are allowed to reside in a belligerent country during the war, they may sue in the courts of that country. (*1 Salk. 46.*) Other alien enemies cannot sue in the courts of a belligerent.

SEC. 30. The ships and merchandise on board of them, belonging to persons domiciled in an enemy's country, though belonging to a neutral nation, are a part of the enemy's trade, and liable to a capture and confiscation by the other belligerent. (*1 Wheat. 46, 54. Wheat. Int. L. P. 4, c. 1, §§ 13—21. 1 Rob. 102. 16 Johns. 128.*)

If a neutral, domiciled in a foreign neutral State, have a house of trade in a belligerent country, the trade is deemed hostile, without reference to the domicil of the partners. (*4 Wheat. 107.*)

## CAPTURE OF ENEMIES' GOODS.

SEC. 31. In war, each nation may, by belligerent usage, seize on the ships and cargoes belonging to the hostile State or its citizens; and by such usage, the goods of an enemy in neutral ships on the high seas, or within the maritime curtilage of either belligerent, are also liable to capture. (1 *Kent's Com.* 5th ed. 126, 127. The *Nereide*, *Wheat. Int. L. P.* 4, c. 3, §§ 19—24. 11 *Wheat.* 42.)

But this invasion of neutral vessels rests on a custom established by force, by armed belligerents over unarmed neutral ships, and has no foundation of principle to rest upon. For it really carries the war into that exclusive jurisdiction of a neutral against his consent.

The Congress of Paris, of 1856, has by treaty declared against this invasion of neutral vessels by belligerent armed ships, and the capture there of enemies' property. This war usage and paper blockades, direct violations of the freedom of the seas, are abandoned, and neutral commerce is free. The doctrines of the treaty of Utrecht, of 1713, of free ships, free goods, and that the flag protects the ship and all non-combatants on board, are now admitted as a part of the law of nations. The old usages of war, allowing captures of enemies' property on board neutral ships, must be confined to strict contraband of war, to arms, ammunition and munitions of war.

The old usages of warlike captures are forever superseded, and we record them as part of the history of the law of nations, as we would hang up in a collection of natural history the skeleton of the extinct mammoth or mastodon.

SEC. 32. The right of neutral ships to trade freely, except to places actually invested or strictly blockaded by a belligerent, notwithstanding the war, is generally con-

ceded. Trade in strict contraband of war, and direct trade with the army or armed ships of either belligerent, would not be allowable, as this would be a departure from neutrality.

Some belligerents have established a custom, neither uniform, universal nor established by common consent of Christian nations, of searching neutral vessels for goods of the enemy. And for forcible resistance of such search they have been seized and condemned by the courts of belligerent captors. Enemies' property found on board of neutral vessels has been also seized and condemned as prize of war. This is making war on belligerent territory in effect.

When it is considered that a neutral ship is a part of a nation's floating territory, where its laws rule and govern all persons on board, it is impossible to find any ground of principle to justify the search of neutral ships, by armed belligerent cruisers or vessels of war, for the private property or persons of the other belligerent. The territory of a nation and its maritime curtilage, as well as its ships, when neutral, on the high seas, are within her jurisdiction, and no authority of a foreign nation can rightfully be exerted therein without the consent of the sovereign power of the State having such exclusive jurisdiction. This is the doctrine of the treaty of commerce and navigation of Utrecht, of 1713, and of the Continental Congress of the United States during the war of the American Revolution. The learned Wheaton, in a note, (2 *Wheat.* 247,) says, that during the war of the American Revolution the United States, recognising the principles of the armed neutrality, exempted by an ordinance of Congress all neutral vessels from capture, except such as were employed in carrying contraband goods or soldiers to the enemy. This was a following out of the doctrine that free ships make free goods, established by the treaty of Utrecht,

and sanctioned, at various times, by all Christian maritime States of Europe.

Albericus Gentilis, an Italian publicist of the sixteenth century, domiciled in England, denied the right of foreign armed ships to search English neutral ships for the goods or persons of their enemies in war. A Tuscan armed ship attempted to search an English merchant ship, and she resisting, was captured and condemned by the Tuscan prize court. Gentilis, who was professor of civil law at Oxford, condemned the act as unjust, and a violation of the maritime rights of England. He says, "the deed of the Tuscans was unlawful, if a huntsman cannot lawfully enter another man's farm without the owner's permission; if it is unlawful to injure an enemy in a neutral territory, and if territory, in this respect, differ not from jurisdiction, neither shall the *custom* above alluded to (if ever anywhere so received) be now obtruded upon me as a *law of the sea* relative to the power of ships of war; for, although the custom may be admitted on the shores of the prince to whom the vessel belongs, it cannot in other seas. Nor let us regard the opinion of these customary jurists, but adhere to those who proceed on general principles. (They teach us that) the defence of the English was just," &c. (11 *Wheat.* 15, n. b.)

SEC. 33. President Madison laid down the doctrine in a message to Congress, that the authority of every nation over its ships on the high seas was exclusive, and that no other nation could rightfully exercise any jurisdiction there unless consented to by the State to which a vessel belonged. This is common sense, and it is the only principle that can secure the freedom of the seas.

SEC. 34. It is true that the United States, during the war of 1812, resorted to this custom of searching for and seizing British goods in neutral ships, upon the principle of *lex talionis*. And as acts of self-defence our republic



has temporarily resorted to this custom to avoid great injury to our commerce. A temporary recognition of the rule was inserted in our treaty with Great Britain of 1794, called Jay's treaty, which has ceased to exist. Similar acts of temporary assent by European nations, opposed to the rule, have arisen from the same motives.

SEC. 35. Our republic, in the war of 1812, the armed neutrality and most of the nations of Europe, have at different times asserted, in arms, the freedom of the seas. A temporary coerced acquiescence in the custom, which Great Britain sustained by an overwhelming navy, is not an admission of the principle of a right of visitation and search by armed belligerent ships, but a temporary acquiescence in a custom kept up by force.

SEC. 36. All ships on the high seas are, of right, subject to the laws of the nations to which they respectively belong, and no armed ships of belligerents can have any just authority to enter on board neutral ships for any purpose, except so far as the laws of the respective neutral nations may allow. A nation's ships are her floating territory, and no forcible invasion of it, by any foreign power, ought to be allowed. Neutral territory and neutral ships must be held sacred against belligerent invasion.

SEC. 37. A neutral ship carrying enemies' goods is not, by the usage of nations, liable on that account to condemnation. (3 *Wash. C. C. R.* 117. 1 *Kent's Com.* 5th ed. 125.) Upon the seizure and condemnation of enemies' goods in neutral ships, the ship is entitled to freight. (3 *Wash. C. C. R.* 117.)

The usage of searching neutral ships for the goods of an enemy has no existence in time of peace, and is only practiced as a belligerent right. (10 *Wheat.* 66. *Wheat. Int. L. P.* 4, c. 3, § 24. *The Mariana Flora*, 11 *Wheat.* 1, 42.) The Supreme Court of the United States, in the last case, say: "It is necessary to ascertain what are the



rights and duties of armed and other ships, navigating the ocean in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions."

#### TITLE BY CAPTURE.

SEC. 38. The title to personal property of an enemy, captured on land by a military power, vests in the captors after twenty-four hours' possession, without any legal condemnation. (*Vattel*, B. c. 13, § 196, n. 168, p. 385, 6th Am. ed. *Wheat. Int. L. P.* 4, c. 2, §§ 11, 12.)

SEC. 39. If captures are made at sea the rule is different. In such cases, in order to divest the owner of his right of property, it must be brought *infra præsidia*, and be placed within the actual power of the captors, either in a neutral port or port of the enemy, or of any ally in the war, and the prize court of the belligerent passing sentence of condemnation must actually sit in the country of the captors, or in that of such ally, and must regularly condemn the ship or property captured. A sale and purchase in pursuance of such regular sentence of a prize court will pass the property to the purchaser. (9 *Wheat.* 658. *Wheat. Int. L. P.* 4, c. 2, §§ 11—13. *Vattel*, 6th Am. ed. 385, n. 168; pp. 391, 392, n. 172; pp. 166, n. 107. 1 *Kent's Com.* 5th ed. 101, 123, 124. 1 *Pet. Ad. Dec.* 27. 2 *Ib.* 355.)

#### PRIZE COURTS AND CAPTURES.

SEC. 40. The prize courts of the captor have exclusive jurisdiction of all captures made by the armed ships of a

nation, except in two cases. If a belligerent capture is unlawfully made within or by the use of the territory or waters of a neutral nation, or by vessels armed or equipped, in whole or in part, within a neutral State, in violation of its laws or the law of nations, the tribunals of the neutral may take jurisdiction of the question of the capture, and order restitution. (11 *Wheat.* 42. 7 *Ib.* 350, 471—473, 488, 496. 1 *U. S. St. L.* 381—383, and n. a. 2 *Ib.* 16, n. a.)

If a neutral vessel, captured and not lawfully condemned, come within the jurisdiction of the neutral State, its proper tribunals may decree restitution to the owner. (2 *Pet. Ad. Dec.* 345.) The principle of these exceptions is this, that the prize court of the belligerent having no jurisdiction, its decree of sale, if made, would not change the property, and the owner might assert his title in the courts of any country, except that of the captors, where the property is found.

SEC. 41. A neutral nation may grant to both belligerents, without breach of neutrality, authority to equip and refit their ships of war in the ports of the neutral, if exact equality is observed. Without express permission, neither warring nation can exercise such right. (9 *Cranch*, 359.)

No neutral, nominally naturalized for the purpose, can lawfully take a commission from a belligerent and make captures of the property of the other belligerent. Such acts are substantially piratical. (3 *Dall.* 133, 153, 164. 1 *Kent's Com.* 5th ed. 100. *Act of Cong. U. S. March 3*, 1847. *Vattel*, B. 2, c. 18, § 348. *Ib.* 6th Am. ed. p. 385, n. 6 *Wheat.* 169—172.)

SEC. 42. All questions of the legality of captures belong to prize courts and not to municipal courts. The latter tribunals have no jurisdiction of captures by sea or land.

(*Vattel*, B. 3, c. 13, § 203, 6th Am. ed. pp. 391, 392, n. 172.)

#### RECAPTURE AND POSTLIMINY.

SEC. 43. Recapture of property captured by the enemy at sea, in general restores the owner to his lost right to the ship, cargo or thing captured. If a vessel is recaptured by its own officers or crew, or by any citizens or armed force of the country to which it belongs, or of its allies in the war, the owner becomes re-invested with his original title to the vessel, or vessel and cargo.

#### CONDEMNATION, RECAPTURE, &c.

SEC. 44. Capture by a belligerent, and legal condemnation by a prize court, destroys the title of the owner and vests it in the captors, or their nation or sovereign. (*The Star*, 3 *Wheat.* 86. *Wheat. Int. L. P.* 4, c. 2, §§ 11—13.) According to this doctrine a recapture after condemnation would not restore the owner to his original right of property. This restoration, when allowed, is called in the Roman law *jus postliminii*, a re-investing of the owner in his former estate in the property captured by an enemy. (1 *Kent's Com.* 5th ed. 108. 7 *Wheat.* 355. 2 *U. S. St. L.* 760, n. b. *Ib.* 760, and n. a.)

In Great Britain, recapture after condemnation, even to the end of the war, by British ships, gives the *jus postliminii* to the original British owners, and the armed recaptors are only entitled to salvage. (3 *Wheat.* 88. 2 *Burr.* 1198. 1 *Bl. R.* 27. *Vattel*, 6th Am. ed. 385, n. 168. 1 *Kent's Com.* 5th ed. 111, 112.)

SEC. 45. If property is recaptured from a pirate it must be restored to the original owner, as there could be no legal capture, but a mere dispossession of the owner.

(*Wheat. Int. L. P. 4, c. 7, §§ 11—13.*) In such case, the recaptors are entitled to remuneration in the nature of salvage. (*Ib.* 1 *U. S. St. L. 716.* 2 *Ib.* 16, n. a. *Ib.* 760, and n. a.)

SEC. 46. If property be retaken from a captor having a lawful commission, but not an enemy, the *jus postliminii* prevails, and it must be restored to the owner. The wrongful takings in such case does not change the title, but merely affects the possession of the property. (*Wheat. Hist. L. N. 410.* The Antelope, *Bee's D. C. R. 233.* 2 *U. S. St. L. 16, n. a.*)

In case a neutral vessel be thus retaken, which was captured with contraband of war on board, as defined by the law of nations and by treaties, under circumstances making her condemnation lawful in the ports of the captor, the original owner is not entitled to be restored to his original estate. (*Ib.*)

As a general rule, where neutral property is recaptured from a capture that would not justly authorize a condemnation, no salvage is allowable on such recapture. (*Ib.*)

#### RECAPTURE, SALVAGE, &c.

SEC. 47. The act of Congress of March 3d, 1800, provides that, when any vessel other than a vessel of war or privateer, or when any goods which shall be taken as prize by any vessel acting under authority from the government of the United States, shall appear to have before belonged to any person or persons resident within or under the protection of the United States, and to have been taken by an enemy of the United States, or under authority or pretence of authority from any prince, government or State against which the United States have authorized, or shall authorize, defence or reprisals, such vessel or goods not having been condemned as prize by competent authority

before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, if retaken by a public vessel of the United States, one-eighth, and if retaken by a privateer vessel of the United States, one-sixth part of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been sent forth and armed as a vessel of war, before such capture, or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay for and in lieu of salvage, one moiety of the true value of such vessel of war or privateer. (2 *U. S. St. L.* 16, 17, § 1.)

The third section of the same act provides for restoration to alien friends of the United States, on the principle of reciprocity, in cases where the property had not been condemned, and where the foreign State restores property of the United States under like circumstances. (*Ib.* 17. *Wheat. Int. L. P.* 4, c. 2, §§ 11—13.)

SEC. 48. It is no objection to salvage that a recapture is by a non-commissioned vessel.

To entitle to military salvage, there must have been an actual or constructive capture.

SEC. 49. If a vessel is taken by a belligerent cruiser, and afterwards recaptured, and is again taken by another armed ship of the nation of the first captors, the first captors are not entitled to the prize or payment of salvage, for the recapture destroyed their right, and the last captors are entitled to the prize. (*Wheat. Hist. L. N.* 426.) But if the first captors are dispossessed in fact by the acts of, or by intimidation of the last captors, the prize will be restored to the first captors of the same nation. (*The Mary*, 2 *Wheat.* 123—130.)

SEC. 50. As to real property temporarily in possession

of an enemy, and not retained by the enemy or ceded to him by the treaty of peace, the owner retakes his property as in his first estate, whether the same be national or private property. This right of postliminy prevails unless the right of conquest is perfected by a treaty of peace confirming it. (*Wheat. Int. L. P. 4, c. 2, §§ 11—17.*) This rule, at this day, cannot be of frequent application to private realty or immovables, as, by the general usage of nations, private property of that description is not subject to capture and confiscation. (*7 Pet. U. S. R. 51, 86. Wheat. Int. L. P. 4, c. 2, §§ 17, 18.*) If a nation in possession of an enemy's country sell the public domain, or any of the public immovable property of the enemy State to a *bona fide* purchaser, and a treaty of peace is made without cession of the property so aliened, the *jus postliminii*, on resumption of possession, prevails, and the purchaser will lose his title. All persons buying such immovables take them subject to the right of postliminy, unless they are ceded to the conqueror, or to his assignees, by the treaty of peace. (*Ib.*)

SEC. 51. Neutrals have a right to trade freely to and from the ports of belligerent nations, in all articles of commerce permitted by the laws of each, except contraband of war. Strict and natural contraband of war consists of arms, ammunition and munitions of war. So it was defined in the treaty of commerce and navigation of Utrecht, of 1713, assented to by Great Britain, France and other powers. (*Wheat. Hist. L. N. 126. 1 Wheat. R. 387. Wheat. Int. L. P. 4, c. 3, § 26. 1 Kent's Com. 5th ed. 143, note.*)

SEC. 52. Various treaties have stipulated differently as to what articles are, and what are not, contraband. (*Wheat. Int. L. P. 4, c. 3, §§ 24, 25.*) And no rule, except that of the treaty of Utrecht, has commanded universal assent, and no other ought to be allowed to be part of the law of nations by our republic or other maritime States.

SEC. 53. Articles not generally contraband may become so by being destined for the army or navy of a belligerent, or for a blockaded port or besieged town. (1 *Wheat.* 387. 6 *Mass. R.* 102.)

SEC. 54. A neutral vessel carrying an enemy's provisions to his army or navy is liable to capture of her cargo, and she is allowed for freight. (*Wheat. Int. L. P.* 4, c. 3, §§ 24—26.)

SEC. 55. Unless restrained by treaty, a belligerent may capture and confiscate a neutral ship carrying contraband of war to an enemy, if both ship and cargo belong to the owner of the contraband. (1 *Wheat.* 340.)

SEC. 56. In general, if the ship and cargo belong to different persons, the contraband articles only are confiscated; but the master is not allowed freight. (*Wheat. Int. L. P.* 4, c. 3, §§ 24—26.) If the articles of the cargo are contraband, and the ship belongs to the owner of the contraband, they are all liable to confiscation. (*Ib.*) And if the ship and cargo belong to different persons, the transportation of contraband, under the fraudulent accompaniments of false papers and false destination, will subject the ship and cargo to condemnation. The same result follows if such owner of the ship is bound, by existing treaties, to abstain from carrying such articles of contraband to the enemy. (*Ib.*) In the latter case the vessel violates neutrality.

SEC. 57. Contraband articles must be taken *in delicto*, in order to entitle the captors to procure their condemnation. (*Ib.* 7 *Wheat.* 340.)

SEC. 58. The municipal laws of the United States do not prohibit our merchant ships from carrying contraband of war to a belligerent. In the case of the *Santissima Trinidad*, (7 *Wheat.* 340,) the Supreme Court of the United States say: "It is apparent that though equipped as a vessel of war, she was sent to Buenos Ayres on a commer-

cial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." (*Secretary Webster's Instructions to Thompson, our Minister to Mexico.* 7 *Wheat.* 340. 1 *Kent's Com.* 141, 142, 5th ed. *Vattel*, B. 3, c. 7, § 113.)

SEC. 59. In case a port is blockaded or places are besieged by a belligerent, all neutral commerce is interdicted. A siege or blockade must be actual and strict, and supported by an adequate force, and not by proclamations, like the British paper blockade of eight hundred miles of the coast of France and of her allies. (*Wheat. Int. L. P.* 4, c. 3, §§ 26, 27.)

A blockade does not prevent a neutral vessel in port from coming out with her cargo then on board. (3 *Wheat.* 183.)

SEC. 60. A lawful blockade is formed by the actual stationing of a sufficient naval force at the entrance of the port, and so close as to prevent communication by sea. If this force is driven to sea by a storm, it does not affect the legal effect of the blockade.

SEC. 61. An actual knowledge of it must be brought home to the navigators of a vessel, or she will not be affected by it. (*Ib.*) A proclamation of the blockade in the port or country whence the vessel sailed, prior to sailing, might be sufficient evidence of notice. (*Ib.*) Actual notice to a vessel attempting to enter the port, and warning her off, is sufficient.



A breach of blockade, after notice, is by a vessel's going in or out with a cargo laden after the commencement of the blockade. (*Ib.*)

Neutral property, on board of enemy's ships, armed or unarmed, is not liable to capture by the cruisers of the other belligerent. (3 *Wheat.* 409. 9 *Cranch*, 388.)

SEC. 62. If a neutral vessel is employed to transport the military or naval forces or stores of a belligerent, or enemy's despatches, she is subject to capture and confiscation as party to the war. (1 *Wheat.* 387. *Wheat. Int. L. P.* 4, c. 3, § 25.)

It is said that this is the rule of public law, even if the vessel was impressed by violence. This cannot be so, for upon this principle, if a highwayman should seize a traveller and compel him to carry for him goods, before obtained by robbery, the innocent carrier would, by such a rule, be condemned as criminal. If a neutral is forced to transport the forces of a belligerent, it is a national wrong, and the neutral State may demand redress of the belligerent State. Some of the many claims of our republic upon Mexico were of this description.

SEC. 63. A vessel sailing under an enemy's license, to carry on a trade prohibited by war, is liable to capture and condemnation. (4 *Wheat.* 100, 103. 3 *Ib.* 207. *Wheat. Int. L. P.* 4, c. 2, § 25.)

SEC. 64. The armed vessels, and tribunals of the State granting licenses, are bound to regard them as *pro tanto* relaxations of the laws of war; but the enemy may consider them as, *per se*, a ground of seizure and condemnation of any of its vessels, or of any others sailing under such licenses. (*Ib.*)

SEC. 65. The general principle is, that the citizens of a belligerent are not to have any commercial intercourse or transaction with the enemy, or the enemy's citizens, without permission of their respective governments. (*Ib.*)

SEC. 66. The sovereign power of each belligerent nation can alone grant licenses. (*Ib.*) The sovereign power may relax the rules of non-intercourse in its discretion.

SEC. 67. Passports and safe conducts, when properly granted, in war, are a protection against capture from either belligerents. Passports, safe conducts, capitulations and truces may be made by commanding military or naval officers, and are in general obligatory, and modify hostilities and the rights of war. Good faith and the law of nations require that the conditions agreed on by opposing commanders for the surrender of prisoners, or of any city, fortress or ship, should be faithfully observed by the belligerent nations. The Mexican massacre of Texian prisoners was an atrocious violation of this principle of public law. The long imprisonment of the Emir, Abd-el-Kader, the distinguished Arab chief, by Louis Philippe, in violation of the terms of his capitulation, was a like act. Louis Napoleon, by restoring the injured chief to his freedom, has, in part, redressed this great national wrong.

SEC. 68. War authorizes a conquest of the sovereignty of a nation, if necessary to obtain its just object, of all or any portion of its territory, of all its public property or domain, and a sequestration of the revenues of the conquered territory.

SEC. 69. As a general rule, all property abandoned by the conqueror at the peace, by the *jus postliminii*, returns and revests in the nation or its citizens to whom it belonged at the time of capture. (*Ib.*)

SEC. 70. A just war, followed by conquests of the territory of the enemy and his prostration, ought to be brought to a conclusion as soon as practicable by a treaty of peace on equitable terms. The injured nation is entitled to demand satisfaction for all national wrongs preceding the war, and indemnity for the expenses of the war.

It is right to make a demand for all that is due, and the costs and expenses of collection. Where the offending nation has shown a want of good faith, security by pledge of fortresses or territory may be demanded. The latter condition is rarely desirable. (*Vattel*, B. 3, c. 13, § 194.)

No terms should be demanded beyond these, and if territory is taken to satisfy just claims of a nation, a fair price should be allowed, and the cession of territory should be by fair purchase and payment of full consideration, as was done in our treaty of peace with Mexico of 1848.

SEC. 71. By the old usage of nations, independently of treaties, the goods of an enemy on board neutral ships were liable to capture and condemnation, but in such case the ship was not liable to capture. (1 *Kent's Com.* 5th ed. 125.)

But neutral goods on board the ships of an enemy are not liable to capture. (*Ib.* 128. *The Nereide*, 9 *Cranch*, 388.) Not even if the goods are shipped by the neutral on board of an armed ship of the enemy. (*Ib.* *The Flying Fish*, 2 *Gallis*. 374.) The papers on board must show the neutral character of the property to ensure its protection from capture. (*Ib.*)

SEC. 72. We have shown that no lawful capture of enemy's vessels or property can be made in the territory or curtilage of a neutral nation, or by using them to effect it, though the actual taking may be beyond the neutral jurisdiction. In such cases of violation or abuse of neutral jurisdiction and capture, the admiralty courts of the neutral and its government will hold the capture illegal and void, and compel restitution; and the prize courts of the belligerent, at the instance of the neutral whose territory has been violated, will decree restitution to the owner, though it will not be done at the suit of the belligerent owner, as he cannot sue there for such wrong.

(3 *Wheat.* 447. *Wheat. Int. L. P.* 4, c. 2, §§ 25, 28; c. 3, §§ 11—13. 1 *Kent's Com.* 5th ed. 116—119.)

Where a city or territory, or any immovable property is in possession of a belligerent friend, an ally cannot conquer it, as it is not considered enemy's property. (12 *Pet.* 475.)

Debts due from citizens of one belligerent to those of the other party to the war, bank deposits and bank shares in warring nations, belonging to citizens or subjects of the enemy, ought not to be confiscated; but they should be retained to the close of the war as a safe deposit, though they cannot be sued for or drawn for during the war. (8 *U. S. St. L.* 122, 182. *Convention of U. S. and France*, of 1800, art. 9, and *Jay's Treaty with Great Britain*, art. 10.)

SEC. 73. If enemies' property is taken at sea and is ransomed, and a ransom bill is given to the captor, it is a valid contract, unless the State to which the ransomed ship belongs has prohibited such contracts. (*Wheat. Int. L. P.* 4, c. 2, § 28. 1 *Kent's Com.* 5th ed. 104, 105.) A ransom bill being a legal contract, an action may be brought on it in the courts of either belligerent. (*Ib.* 1 *Robinson's Ad. R.* 201.)

When safe conduct is given to the ransomed ship, to go within a fixed time to a particular port, and by a route prescribed, this exempts her from again being captured. (*Ib.*) If the ship, by proceeding in another course, is recaptured, the ransom bill still binds the party to payment. (*Ib.*)

SEC. 74. If the capturing vessel is captured with the ransom bill, such bill becomes part of the capture, and the debtors on the ransom bill are thereby discharged. (*Ib.*)

SEC. 75. In war, military or naval persons, and the actual fighting population, may be taken prisoners, and forts, navy yards, ships of war and merchant ships and

cargoes, may be captured, but non-combatants ought not to be made prisoners of war. (6 *Webster's W.* 427. *Wheat. Int. L. P.* 4, c. 2, §§ 4—7.) Spies and agents of an enemy may lawfully be captured. By military usage spies, on capture, may be executed. Humanity, we think, calls for a substitution of imprisonment in lieu of execution. No reason exists, founded on self-defence, for inflicting on spies any punishment beyond imprisonment.

Though the usages of war allow the killing of enemies in battle and the execution of spies, no killing of armed enemies is allowed, when they can be captured. Nor should an armed enemy be harmed after he has ceased to fight and offered to surrender. Nor should poison, assassination or any cruel or unusual modes of warfare be resorted to, nor should prisoners be enslaved or treated as culprits or servants. (*Webster's Dip. & Off. Pap.* 330.)

Nor can any civilized nation justify the employment of savage allies, whose known usages in war are an indiscriminate massacre of men, women and children, as humanity forbids such atrocious acts. Great Britain, in the war of the Revolution and of 1812, with the United States, hurled the western savages upon our frontier people. Such inhuman precedents ought not to be followed.

Nor should an enemy's country be ravaged, its towns or cities be destroyed or injured, if it can be avoided; nor should public edifices, devoted to legislation, to the arts and sciences, to education, or to the occupancy of a king, president or ministers of State, be injured or interfered with; churches and all public edifices ought to be respected. (*Wheat. Hist. L. N.* 395, 400.)

No public records, monuments of art or trade ought to be touched or injured by the armed forces of any country. Galleries of paintings and statuary, of curiosities and natural history, as well as scientific instruments and

apparatus, ought to be exempt from capture or injury in war. (*Wheat. Int. L. P. 4, c. 2, §§ 6, 7.*)

Prisoners ought to be exchanged, safe conducts, passports, capitulations, flags of truce, armistices, cartels, and all minor agreements of officers of the army and navy respected. Prisoners discharged on parol are bound to observe it sacredly.

SEC. 76. By the usages of civilized war the executive of the nation, President, king, consul, &c., and his family, the members of the civil government, women, children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and generally all private persons engaged in civil pursuits, and all persons not connected with military or naval operations, unless taken in arms, or guilty of misconduct in violating some usages of war, thereby forfeiting their immunity, are exempt from capture. (*Wheat. Int. L. P. 4, c. 2, § 4.*)

#### CONCLUSION OF WAR.

SEC. 77. We have shown the principles of equity on which all wars should be concluded, and that no wars should be commenced, even for great national wrongs, until negotiation, mediation, arbitrament, and all practical, peaceful modes of obtaining redress from the offending nation should have been exhausted without success; and that for small national injuries wars are not justifiable upon sound ethical principles. That wars should be ended as soon as practicable, upon terms equitable and just to both parties.

SEC. 78. Christianity and the commercial spirit of the age, by steamers, railways and telegraphs, binding all nations in the bonds of interest and social communion, are fast removing the incitements to war.

Force may yet be necessary to restrain savage tribes

and piratical hordes, that are incapable of understanding, or indisposed to observe the laws of God, enforcing peace, equity and humanity. But among civilized nations a resort to war, to settle questions of national right and duty, is as absurd as the ancient common law trial by battle. As Christianity, with its improved civilization, has properly referred all municipal rights and duties to tribunals of justice for decision, so we trust that all civilized nations, inspired by the Gospel of peace, by an enlightened self-interest and by the genial influence of commerce, may repudiate war as a relict of barbarous ages, and refer all practicable questions of national controversy to arbitration, if amicable negotiation shall fail to settle them.

The progress of our age calls for this great improvement, for the repudiation of war, its horrors, its consequent military despotisms, its taxes, its poverty and suffering, and for the general diffusion of freedom and commerce, under the broad-spread wings of the celestial dove, bearing the olive branch of peace. Then shall the earth be full of the knowledge of the Lord as the waters cover the sea, and all the inhabitants of the world shall be glad, and its desolated fields shall rejoice and blossom as the rose.

## CHAPTER XIV.

### PUBLIC LAW OF INTER-OCEANIC COMMUNICATION ACROSS THE ISTHMUS OF PANAMA AND OTHER NARROW PARTS OF THE AMERICAN CONTINENT.

SEC. 1. Though the Northmen, about the eleventh century, discovered the northern part of America, and made some settlements along the coast of New-England and as far south as New-York or farther, they failed to make a permanent settlement and colonization of America. The history of these ephemeral colonies is lost, and though the remains of an incipient civilization are found extending from our great lakes to Mexico, we know not whether to attribute them to the Aztecs, to the Northmen or to some lost race. Perhaps the Aztecs once occupied the West, and ages ago receded before Asiatic hordes, the ancestors of our aborigines.

Without any knowledge of the discovery of America by the Northmen, Columbus, inspired by the conviction that by sailing west, across the Atlantic, he could reach the gold-producing shores of Asia, Cathai, (China,) Zippangi (Japan) and the Spice Islands, planned his voyage of discovery. In the latter part of the fifteenth century he made his successful voyage and revealed the existence of America, which he always believed was Asia.

The inspiring thought, breathed from on high into the soul of this great man, seems to have been bequeathed by him to our republic, and she is now about to open, by railways and a ship canal, an easy avenue across the Isth-



mus of Panama and the narrow parts of the American continent, for commercial intercourse between Europe and Asia and the islands of the Pacific, China and Japan, the ancient Cathai and Zipangi.

Communications across the Isthmus of Panama or by way of Lake Nicaragua, by ship canal, have been long since suggested. The distinguished scientific traveller, Alexander von Humboldt, and many able engineers, have given their views to the world on the subject. The writer of this work, in 1834, wrote an elaborate argument in favor of the construction of such a canal by our republic, addressed to a friend, a senator of the United States. The Mexican war, and the conquest and treaty cession of California and New-Mexico, as well as the possession of Oregon, guaranteed by the Oregon treaty, presented a great national motive for easy inter-oceanic communication between the Atlantic and the Pacific, and fixed the attention of our government on this subject. The visions of Columbus are now being realized by American enterprise and energy.

SEC. 2. A company of gentlemen, citizens of our republic, having secured the necessary concession, have constructed a railway across the Isthmus of Panama with American capital, being the first inter-oceanic railway. To our citizens was reserved, by Providence, the honor of opening the first railway communication from the Atlantic to the Pacific Ocean. This celebrated work was commenced in 1849. The government of our republic, by a treaty with New-Granada of December 12, 1846, ratified June 12, 1848, has secured the neutrality of the isthmus, and has extended the ægis of our protection over this noble work. Our citizens and their property are entitled to free passage across the isthmus. The thirty-fifth article of the treaty, sections one and two, may be considered declaratory of the true principles of

public law, and stamping the isthmus, for the purposes of transit from ocean to ocean, as a common highway for the contracting parties. (*Acts of Cong. of 1848*, pp. 254—256.)

SEC. 3. Our treaty with Great Britain has declared that all inter-oceanic communications across the Isthmus of Panama and Tehuantepec, or by way of Lake Nicaragua, by railways or ship canals, shall be guaranteed to the companies constructing them, by leave of the local authorities, and shall be forever exempt from belligerent acts of the contracting parties, and shall be used by the citizens of each, upon payment of equal tolls, as well as by all other nations who shall guarantee the neutrality and security of these communications by similar treaties of guaranty. This important treaty is dated April 19th, 1850. Phillimore, in his work on International Law, (pp. 183, 184,) commends this treaty as of great value to mankind, as well on account of its principle as its object. But the British government having given to this treaty a construction that destroyed its legitimate effect, and having refused to execute their part of the treaty, as understood by the American Secretary, Clayton, and by our republic, President Buchanan and his able Secretary, Cass, have proceeded to negotiate treaties with Nicaragua and Granada, without reference to the Clayton and Bulwer treaty, for the protection of American interests. This treaty shows the impracticability of mingling European monarchical and American republican interests by treaty on our continent.

SEC. 4. It may now be deemed that the inter-oceanic communication by railways or ship canals across the narrow parts of the American continent are stamped with freedom, neutrality and equality, as to all maritime nations acceding to the terms of guaranty of our treaty with Great Britain. As a principle of public law the inter-

oceanic passes are free to all nations, so that the commerce of Europe, Asia, America and Australia may pass free from ocean to ocean.

The United States and Great Britain have taken the lead in this sublime application of the freedom of the seas to the ship canals and railways from ocean to ocean. The union of the Atlantic and Pacific oceans, by a ship canal, under the protection of these powers, will remain a monument to their glory until the heavens shall be rolled together as a scroll, and every memorial of the genius and power of man shall have perished. A French company, in 1859, is laboring to make a Nicaragua ship canal, and another French company a Suez ship canal. If completed, the glory of *la belle* France will be complete, and from the heights of honor she may look down on the pyramids.

We are happy to record that the honored land of our ancestors and our native country are to share with our old allies, the gallant French, the honor of realizing the inspired visions of Columbus.

#### CARRYING PLACES FREE TO ALL NATIONS.

SEC. 5. National carrying places from ocean to ocean, and from sea to sea, essential to the commerce of many nations, partake largely of the freedom of the seas. The Isthmus of Suez, of Darien, of Tehuantepec, of Nicaragua, with other like narrow passes of the American continent, are national carrying places, in which all maritime nations have a right of peaceful, secure transit, free of duties or obstructions from the local States. This seems to be a natural right. The States to whom these passes belong have no more right to prohibit free commerce along these highways of the commerce of the world than the Ottoman Porte had to exclude or tax foreign merchant ships passing to and from the Black Sea, a pretension abandoned for

more than a quarter of century. The unfounded pretension of Denmark to levy duties on foreign vessels and cargoes passing into and out of the Baltic Sea, through her maritime curtilage, is like the exploded Turkish claim. Our government has protested against it and ended it. National comity, founded on the golden rule, limits a nation's sovereignty in relation to other nations. (6 *Webster's W.* 610, 611.) While the governments whose territories compose such isthmus passes own the exclusive jurisdiction, subject to the law of national comity, they are bound by the latter not to obstruct them, and also to make, or to allow to be made by some other nation, rail-roads, ship canals and telegraphs, to facilitate the commerce of the world, and allow their free, equal and common use to all maritime States, subject to equal and reasonable supporting tolls, to be paid by all governments guaranteeing the neutrality of such territory and the adjacent seas.

Our celebrated ordinance of 1787, ratified by Congress in 1789, (1 *U. S. St. L.* 501,) first declared that the freedom of navigable waters belonged to passes connecting them. It is a principle of American public law, and seems to be part of the law of nations. The above treaties support this doctrine.

#### TEHUANTEPEC AND THE GARAY GRANT.

SEC. 6. On the 1st of March, 1842, Mexico made a grant of a right of way across the Isthmus of Tehuantepec from the Atlantic to the Pacific, to Don Jose de Garay, by which he or his assigns, whether Mexicans or foreigners, were entitled to make a ship canal or rail-road from ocean to ocean. By this grant Mexico conveyed to Garay, in fee, as a consideration and inducement for his engagement to open this inter-oceanic communication, a large tract of Mexican public domain, contiguous, being all

vacant lands within ten leagues of it, and conferred on him and his assigns all necessary rights of eminent domain and franchises to complete the great undertaking.

By the grant the right was declared exclusive to Garay and his assigns to construct such communication and hold the exclusive control of it for fifty years; that the same should be neutral and common to all nations at peace with Mexico; that the Mexican government should not levy "any tax or impost" upon any travellers and their effects *in transitu*, or upon property or articles passing the same during the fifty years of the exclusive ownership secured to Garay and his assigns of such communication; that no custom-house officers during that period should "interfere in the collection of transport dues, nor in the collection of freights, lighterage, tonnage, or any class of dues, for none shall be payable by vessels loading or unloading for the transport of effects;" and that all foreigners were "permitted to acquire real property and exercise any trade or calling, not even excepting mining, within the distance of fifty leagues on either side of the line of transit." It also declared, that the granted territory should be the country of all who might come to establish themselves there, subject, however, to the laws of Mexico. There were large concessions and privileges offered to foreign colonists.

This grant passed from Garay to British subjects, and was held by them, September 7th, 1847, when our treaty of peace with Mexico was negotiating, and the Mexican commissioners refused to sell this right of way to the United States on that ground.

By purchase and assignment from the British owners, P. A. Hargous and other Americans became owners of the Garay grant, franchise, &c. They, by authority of the Mexican government, entered upon the territory to make surveys, preparatory to the construction of a rail-road

from ocean to ocean, pursuant to the grant. In 1850, the right of Hargous, as assignee, was recognised by Mexico in negotiating a treaty with our republic.

In May, 1851, the Mexican Congress passed a law annulling the Garay grant, while the American owners were occupied with expensive surveys and preparations for the construction of this great international railway. This act was founded on the pretence that the extension of the time for the commencement of the work by the Dictator, Salas, November 5th, 1846, was illegal. As most of the *de facto* governments of Mexico for twenty years were of the same sort, and as the residue of his decrees are treated as valid, it is obvious that the true reason is not avowed. The recognitions of the government of the rights of the assignees, since the decree of Salas, estops Mexico to allege this objection. What is the effect of this repeal? By the law of Mexico the government is prohibited from passing any retrospective law, or law impairing the obligation of contracts. It is a principle of natural equity, as well as of American public law and of the law of nations. The late Secretary of State, Daniel Webster, and the Committee of Foreign Relations of the Senate of the United States, have properly affirmed the title of Hargous and the American company to the Garay grant to be clear and indisputable.

The right and duty of our government is clear in this matter. As the company has been dispossessed by force by Mexico, a national writ of possession seems demanded from our government, in justice to the American owners, to our national right of transit, as well as to that of other maritime nations.

SEC. 7. It seems that freedom of transit by persons and property, as well as mails, across narrow passes and carrying places from ocean to ocean, and from sea to sea, free of toll or duty, is a natural right of all nations. This

principle seems to draw after it a like freedom for the ports at the termini. It imposes a corresponding duty on all maritime States to guarantee the neutrality of such international communications, ports and the contiguous seas. For the use of telegraphs, improved roads, railroads, canals and other artificial works, it is obviously right that reasonable, equal and remunerative tolls should be paid by all who use them.

The invention of the steamer by Fulton, and of the telegraph by Morse, has greatly increased, and is now rapidly extending international intercourse. Franklin invited the electric fluid down, and he handed it to Morse, who has made it the lightning messenger of commerce. These honored sons of America have secured the ultimate freedom of commerce, and of international communications among all nations, as well as the diffusion of Christianity, civilization and free institutions.

#### MEXICAN TREATY.

SEC. 8. A treaty with Mexico has secured to our Union certain territory and rights to facilitate a rail-road to the Pacific from our Atlantic States, and free passage for our inter-oceanic commerce and mails *via* Tehuantepec.

#### PANAMA SHIP CANAL.

SEC. 9. This project has been long discussed. It is now ascertained that a ship canal of forty-five and three-fourths miles can be constructed from the Atlantic to the Pacific Ocean at a cost of eighty millions of dollars. This great international work, if carried through by the leading maritime powers, would give a powerful impetus to commerce, and to the diffusion of the Gospel and civiliza-



tion. The following is the official plan of this noble work :

*“ The Proposed Darien Ship Canal.—Report of Commodore Paulding to the Navy Department.*

“ FLAG-SHIP WABASH, OFF ASPINWALL, }  
September 18, 1857. }

“ Sir,—On the 26th of August, under the orders of the department of June 1st, I organized a party and set out on a *reconnoissance* of the isthmus between Aspinwall and Panama, with reference to the ‘ practicability of constructing an inter-oceanic canal across the Isthmus of Darien ’ at this point.

“ The route by which the rail-road passes was in every respect the most desirable for this purpose, and the means by which the character of the country could be best known, as far as its topography and the features essential with the object in view could be seen. It was, in fact, the direct means for the accomplishment of the purpose.

“ The officers who accompanied me have reported their opinions in writing, which shall be available to the department if it is desired that they should be submitted.

“ Colonel George M. Totten, the pioneer of the Panama Rail-Road, and, since its construction, the chief engineer of the company, favored me with his presence and extensive information of what relates to this part of the isthmus. To him, and to Allan McLane, Esq., the Pacific Mail Steamship Company’s agent, who placed the steamer *Tobago* at my service for the examination of the Bay of Panama, I was indebted for every facility that they could afford me. Commander Hoff, the senior officer present in the Bay of Panama, furnished a boat to verify the chart which accompanies this report. By this it will be seen that the water is shoal for a considerable extent, both to the east and west of the city of Panama.



“It is supposed that the canal could be united with the waters of the Pacific on either side of the city, and that a channel might be dredged to the depth of thirty feet, to meet the navigable waters for ships of large draught. The bay then expands into an ample harbor, where the winds are said never to blow with violence, sufficiently comprehensive for the commerce of the world, and studded with islands, convenient for all the great purposes that the condition of things would call for by the construction of a canal through the isthmus.

“The isthmus itself seems to present no serious obstacle to science for the construction of a canal. The whole extent, from the Atlantic to the Pacific Ocean, is made up of swamps, hills and plains, and the highest point of land where the rail-road passes is no more than two hundred and eighty-six feet above the level of the sea. On the whole route most, if not all, the hills through which the canal would pass would be required for embankments over the plains and swamps, and I can perceive no insuperable obstacle to piercing the highest part, so as conveniently to make the waters of the Chagres and Obispo and Rio Grande available for the wants of a canal.

“The truth is, that in a climate less favorable to the white man, I do not think the question of ‘feasibility’ would be raised. It seems to be conceded, from experience that the African race can alone persistently labor in this climate. A few thousands of free blacks might be obtained from the West India Islands, but this resource would be inadequate, as was experienced by the operations on the Panama Rail-Road. The want of men to labor would seem to be the great obstacle to the successful accomplishment of a work of so much magnitude.

“To illustrate the topographical features of the isthmus by the route of the rail-road, and near which the canal

must pass, I have the honor to refer you to the accompanying profile, which has been kindly furnished by Colonel Totten.

“On the Atlantic side the canal would enter the bay of Aspinwall, the chart of which is herewith referred. In approaching this point it would pass a few miles from the Chagres, and enter the bay near the river Chindi. Here, it will be seen, as in the Bay of Panama, extensive dredging for a channel to meet the deep water would be necessary. The bay expands for the distance of about five miles, between two headlands, and is open to the sea. A breakwater would be necessary here. With such a one as would afford the necessary protection against the ocean swell, the Bay of Aspinwall, like the Bay of Panama, would afford ample room for the commerce of Europe as well as America; and in contemplating these two bays with the eye of a seaman, and in reference to the great work in question, it would look as though nature had provided them for the special convenience of man in his laborious undertakings for the extension of commerce, and a place where all nations may meet in their varied pursuits on the highway of the ocean.

“In a work like that of a canal through the Isthmus of Darien, it is to be supposed that the requirements of commerce and navigation in its most extended application would alone be considered; and taking this for the standard, a canal two hundred feet wide and thirty feet deep would seem to be the appropriate dimensions.

“With such an avenue from the Atlantic to the Pacific, the stormy and distant seas of the extreme south would be abandoned by Europe as well as America, and we should meet here on neutral ground, pursuing with a common purpose the paths of peaceful industry, which, by its means, we may suppose would effect a moral revolution such as the world has never known, and surpassing

in importance that which would be effected in the revolution of the commercial world.

“In making this report, as well as in the performance of the service, I trust that I may have fulfilled the wishes and expectations of the department; and if I have failed in any thing, I desire it may not be ascribed to a want of zeal, but rather that a laborious naval life has rendered me unequal to the task imposed by the department.

“I am, sir, very respectfully, your obedient servant,

“H. PAULDING,

“*Flag-Officer Commanding Home Squadron.*

“Hon. ISAAC TOUCEY,

“*Secretary of the Navy, Washington, D. C.*”

“*Dimensions and other Data of the Proposed Ship Canal.*

“Length from shore to shore,  $45\frac{3}{4}$  miles.

“Length from five fathoms water in Navy Bay, on the Atlantic, to three fathoms water in Panama Bay, on the Pacific,  $48\frac{3}{4}$  miles.

“The prism of water to be 150 feet wide at the bottom, 270 feet wide at surface, and 31 feet deep.

“The locks to be 400 feet in clear length of chamber, and 80 feet in clear width.

“The summit level will be 150 feet above mean tide of the Atlantic and Pacific oceans.

“The summit cut will be about four miles long. The deepest cutting on this level will be 136 feet, and the average depth of the cut will be 49 feet.

“The River Chagres yields an ample supply of water for the canal at all seasons of the year. The summit level will be supplied by a feeder about 24 miles long, which will tap the River Chagres about 21 miles above the town of Cruces, where the level of the river is about 185 feet above mean tide, and about 35 feet above the summit level.

“ The cost of this canal, including the requisite harbor improvements at each end, will not exceed \$80,000,000.

“ G. M. TOTTEN.

“ ASPINWALL, *September 14, 1857.*”

AMERICAN PROTECTORATE.

SEC. 10. The administration of President Buchanan has inaugurated, in 1857 and '58, a foreign policy founded on the principle of the Monroe doctrine, prohibiting intervention of European governments in the affairs of the States of Continental America and of the adjacent islands, and on the right and duty of our republic to establish and protect the inter-oceanic commerce of American citizens, and of all aliens on all the narrow passes between the Atlantic and Pacific oceans, the great international highways of the world. This benign policy holds the local governments to the obligation of providing for the security of all foreign property, and of all foreigners passing on inter-oceanic railways, ship canals, steamers or by other means of transit, and to the payment for all losses of life or property by the default of the administration of the *lex loci*. The convention between the United States and New-Granada of the 10th of September, 1857, and the treaty between the United States and Nicaragua of the 16th of November, 1857, are founded on these principles, and they form a remarkable era in the diplomacy and foreign policy of our republic. The treaty with the republic of Nicaragua establishes a protectorate in effect over that State, and foreshadows the tendency of the people of the whole American continent, from the region of the Panama Rail-Road northward, and the adjacent islands, to unite with our republic, and enjoy, in State municipal independence, their own laws, customs and liberties; with the peace, security, commerce, national protection and pros-

perity arising from the Constitution of the United States, the benign effects of our free institutions and from the power and glory of our republic. Our mission is not one of aggression, but of peaceful expansion at the request of adjacent peoples, and of disorganized and revolutionary States, seeking the happiness, prosperity and freedom that flow from our republican government.

A century hence our republic will cover probably all Mexico and the Central American States, including New-Granada, with Cuba, Hayti and Porto Rico. Our free commerce of five thousand miles on the Atlantic, Gulf of Mexico and Pacific, our free institutions, unparalleled prosperity and vastly expanding power, make their union with the United States important to them, as each new State would enjoy all local municipal rights and national protection that the States of Virginia, New-York or Massachusetts now possess. Such an expansion of the area of freedom would bless the people of those unhappily governed regions, while the commerce, manufactures, agriculture and mechanic arts of the whole Union would be expanded and stimulated, and the prosperity of the whole promoted by it.

A valuable and important treaty with Nicaragua, of which we have spoken, and which was honorable to the administration of President Buchanan and beneficial to the other party, though signed by our minister and that of Nicaragua, is not yet ratified.

Our republic is charged with a great public duty, to open the American inter-oceanic passes to the free and equal commerce of all nations, and she will perform it.

Russia opened, by her arms, in 1829, the Black Sea, Bosphorus and Dardanelles, to the commerce of all nations, and she will keep them open, and will probably cover Turkey in Europe and Asia by her dominion, and re-commence civilization and improvement in those once

populous, fruitful, rich and powerful countries. This is the policy of Russia.

The passes *via* Suez, a ship canal, rail-roads and the Red Sea, connecting the Indian Ocean and Mediterranean, seem to call France to their completion and protection. And the benign mission of France seems to be an expansion of her power over the Isthmus of Suez, the Red Sea, Egypt and all Northern Africa, bordering the Mediterranean Sea. This appears to be an event soon to take place. It seems equally probable that Russia will soon extend her power to the Mediterranean, and control the straits from it to the Black Sea.

These great nations, opening and protecting all these inter-oceanic communications to the world's commerce, will discharge a duty providentially imposed on them for the benefit of all nations.

## CHAPTER XV.

### CONGRESS OF PARIS OF 1856.

THE war carried on for two years between Russia, of the one part, and Turkey, Great Britain, France and their allies on the other part, was closed in 1856 by a Congress of the representatives of the nations above named, of Sardinia, one of the allies, of Austria and of Prussia.

This war originated in the natural and traditionary policy of Russia to extend her dominion to the Mediterranean Sea, so that her vast empire might participate freely in ocean commerce, and acquire thereby wealth, and give civilization and prosperity to sixty-five millions of people. As the Bosphorus and Dardanelles, and all Turkey, had, for four centuries, been held by the encamped followers of Mahomet, whose barbarous and debasing principles, drawn from the Koran, had cursed the most fertile regions of the earth with sterility, and the Greeks and other conquered races with unrelenting despotism, is it strange that the Emperor Nicholas should disregard the Moslem title by a savage conquest, and seek the Turkish maritime coasts for the expansion of Russian commerce? Turkey, disorganized and decaying, was supported by France and Great Britain, from fear, perhaps, of the colossal power of Russia.

This war, after costing, probably, the lives of half a million of men and some eight hundred millions of dollars, has ceased. In the treaties of peace we see the providence of God bringing good out of evil. The leading belliger-

ents have been induced, by their pretences for the war and its events, to coerce the Sultan to establish freedom of religion in all his dominions, thereby giving the Bible, liberal government and civilization to thirty millions of people. This noble principle and equal rights to all her people is the blessing God has given to Turkey, and free Christianity may yet regenerate her, and confer upon her civilization, wealth, power, prosperity and happiness. The next important principle is, that Turkey is adopted a member of the family of Christian nations and subject to the law of nations, based on the Gospel.

Another permanent law laid down in these treaties declares the complete freedom of navigation of the Black Sea and of the river Danube to all merchant vessels of all nations as an international right. War vessels are excluded from these waters, and they are wisely devoted to commerce and peaceful industry.

A further rule of public law was re-stated and established anew—the duty of nations to settle their differences amicably by negotiation, if practicable, and avoid wars.

The following declares the asserted doctrines of maritime law :

*“Declaration respecting Maritime Law, signed by the Plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, assembled in Congress at Paris, April 16, 1856:*

“The plenipotentiaries who signed the treaty of Paris of the 30th of March, 1856, assembled in Conference, considering,

“That maritime law in time of war has long been the subject of deplorable disputes;

“That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between



neutrals and belligerents which may occasion serious difficulties, and even conflicts;

“That it is consequently advantageous to establish a uniform doctrine on so important a point ;

“That the plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their governments are animated, than by seeking to introduce into international relations fixed principles in this respect ;

“The above mentioned plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object ; and, having come to an agreement, have adopted the following solemn declarations :

“ 1. Privateering is, and remains abolished.

“ 2. The neutral flag covers enemy's goods, with the exception of contraband of war.

“ 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

“ 4. Blockades, in order to be binding, must be effective ; that is to say, maintained by a force sufficient really to prevent access to the coast by the enemy.

“The governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the States which have not taken part in the Congress of Paris, and invite them to accede to it.

“Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success.

“The present declaration is not and shall not be bind-

ing, except between those powers who have acceded or shall accede to it.

“ Done at Paris, the 16th of April, 1856.

(Signed,)

“ BUOL-SCHAUENSTEIN,	HATZFELDT,
“ HUBNER,	ORLOFF,
“ WALEWSKI,	BRUNNOW,
“ BOURQUENEY,	CAVOUR,
“ CLARENDON,	DE VILLAMARINA.
“ COWLEY,	AALI,
“ MANTEUFFEL,	MEHEMMED DJEMIL.”

Had these powers adopted the principle proposed by our government—that all private merchant ships and their cargoes and non-combatants should be exempt from belligerent seizure on the seas and oceans, and enjoy the same immunity from capture as private property and persons on land, it would have been better. President J. Q. Adams and Henry Clay, Secretary of State, with great ability and unanswerable arguments, insisted that this benign and just American improvement of public law should be sanctioned at the American Congress at Panama. In half a century European nations will assent to it.

The rule as to privateers is one decidedly unequal as between monarchies with great navies and republics with small ones, as the latter are devoted to peace, commerce, industry and economy. To the latter, privateering is a necessary means of defence, while to the former its place is supplied by costly armed ships, always kept up by heavy national taxation. The American rule is based upon the Gospel of peace, takes away the motives to war, and makes it an unprofitable contest to the belligerent. It supersedes privateering and all other warlike action upon private persons and property.

A singular feature of these treaties consists in an influential coercion of the Sultan by the Christian nations to abandon the ferocious and persecuting doctrines of Mahomet, and to establish in their place Christian civilization, freedom of religion and equal rights. How can any of these Powers, for the future, deny freedom of religion and equality of rights as the true rule of government? The sovereigns of Europe, in the celebrated compact of the Holy Alliance, declared the Gospel the true basis and rule of international right and duty, as well as of domestic administration. Its precepts press on all nations these doctrines of freedom and equality.

The American Minister at the Sublime Porte, before the meeting of the Peace Congress at Paris, in an elaborate official communication to that government, urged upon it the establishment of full religious liberty and equal rights, now decreed by the unanimous advice of Christian powers. The stormy passions of men have subsided in the Crimea and on the Danube, and the celestial bow of hope gives promise of peace, progress and of Heaven's blessings upon the East and the West.

The Lord reigneth ; let the earth rejoice.

Since the above was written, the above maritime code has been proposed by the French Emperor to our republic for acceptance.

Our government, by Secretary Marcy, by letter of July 28th, 1856, to the French Minister, declined to accept the privateering clause, and offered to exempt all private property and persons non-combatant by sea and land from belligerent capture or molestation.

As no nation has a right to prescribe to another the means it may employ in self-defence and for its own preservation, and as the condition prohibiting privateering or volunteer maritime fleets is illegal and void by the law of nations, the doctrine, free ships, free goods, is

now absolutely incorporated as part of the code of international law. And so the Emperor of France substantially conceded at Cherbourg, when he announced the freedom of the seas established.

## CHAPTER XVI.

### DUTY OF CIVILIZED NATIONS TO THOSE OF INFERIOR CIVILIZATION.

SEC. 1. Among Pagan nations brute force has always given, and now gives law. The whole history of ancient and modern heathen nations attests this truth. Christianity, the only true basis of a permanent civilization, is founded on Heaven's great law of love, of justice and of benevolence, commanding all men to do as they would be done unto. All Mahomedan countries and people, the Hindoos, the Chinese, the Japanese, the Africans, the Aztecs, the North American Indians and other heathens, substantially and practically substitute might for right, force for justice and cruelty for mercy. The atrocities of Mahomedans and Hindoos in all ages are like the revels of incarnate demons more than the acts of human beings. These unchristianized and uncivilized people seem incapable of performing moral and social duties, and of international relations, and must of course be restrained by Christian nations, by kindly influences, and by such applications of military and naval power as may be necessary to keep them from mischief and punish their atrocities, and thereby prevent their repetition.

The golden rule requires of Christian nations, however, the duty of diffusing among all Pagan people the Gospel of Jesus Christ, by sending to them the Bible, the missionary and the school-master. These missionaries may be some-

times murdered by ungrateful and cruel Pagans, as in India, but the command of God is to preach the Gospel to every creature, even though the blood of the missionaries may fertilize their fields of labor. The performance of this duty will open new industrial pursuits and products, new sources of trade and profitable commerce, as heathen nations are brought under the influence of the Gospel and its effective civilization. Industry, commerce and prosperity follow in the track of Christianity, and all maritime nations have a special pecuniary interest in diffusing the Bible and sending the missionary and the schoolmaster to every uncivilized people. If this be so, no Christian nation should encourage its citizens or allow them to furnish to such people opium, ardent spirits, or any thing that is injurious to their health or morals. Nor should Christian nations contaminate themselves with heathen worship, or in any manner support or countenance its idolatry. The judgments of God upon the Jews for this offence warn nations to beware of committing it.

SEC. 2. It certainly is not allowable to conquer a Pagan nation to bring it under Christian influences and a civilizing power, as Peter the Hermit preached and the Popes ordained. But where conquests have been made, as by the British in India, it is certainly right to maintain an ascendancy, but the government should be administered upon the principles of the Gospel. The happiness of the governed and of the rulers should be aimed at, and justice, benevolence and mercy should form the basis of the dominion, and pure Christianity should be substituted in place of heathenism as rapidly as possible.

SEC. 3. The same principles are applicable to the colored and other dependent races, whose preservation depends upon their servile condition while they are in contact with a superior white race. The superior civilized nations of Christian white men ought, as far as possible, to civilize

and Christianize all negroes and Indians. The highest civilization of the African and the Indian may be, and probably will be, far inferior to that of the free white American, but this fact imposes on the superior race duties of protection and kindness. Hence the African and Caucasian slave trade, the Cooley, Asiatic and African apprentice immigrant system, a disguised slave importation, and all like proceedings, ought to be denounced as piracy by the law of all Christian nations, and punished accordingly. Our republic acts upon these noble principles.

SEC. 4. But a superior race owes no duty to an inferior one to amalgamate with it, or to adopt a legal or social equality, as this proceeding would supplant civilization by barbarism, and degenerate the white race without elevating the colored races to equality.

SEC. 5. Duty and interest prompt all Christian nations to spread free Christianity over the world. Knowledge without Christianity may enlighten the heathen, but it will produce its Nena Sahibs and infidels. When all nations shall enjoy Christian civilization, then earth's desert will blossom as the rose. Commerce is the interested carrier of the Bible, as well as of merchandise, and of the productions of every land. The instruments of commerce, the ship, the steamer, the railway, the telegraph, the submarine telegraph, water, and the gases, oxygen and hydrogen, composing it, and steam and air, are all, or soon will be, aids in this great work of civilization and Christianization. The writer of this, before the first steamer crossed the Atlantic, in a published treatise, predicted the navigation of the oceans and seas ultimately by the use of the burning gases, oxygen and hydrogen, to be obtained from water by some cheap and simple process to be discovered. Since water can now be cheaply decomposed by magnetic electricity, by mere motion, produced by steam or water power, we seem approaching the era when this fuel will

be substituted for coal, in whole or in part, and when every sea-vessel shall be a steamer upon this plan, and using, at night, a powerful electro-magnetic light to prevent collision.

If interest and duty prompt nations to facilitate commerce with every people, their steamships thus navigated, and submarine telegraphs binding continents together in hourly intercourse, become objects of international relation and interest. How delightful to witness the great nations guided by Providence in this direction, and hastening, by means so simple and natural, the time when the Bible and Christian civilization shall be carried on the wings of commerce to every nation and people. The lightning shall then be a swift messenger of peace on earth and good will to men, as well as of trade and intercourse. Then will the sun seem to stand still, as the American, the European, the Asiatic and the African converse daily of commercial matters and of the ways of holiness. Science and Christianity will form a holy union. Then, agreeably to the inspired visions of Isaiah, the wilderness and solitary places shall be glad, and all nations shall behold the glory of the Lord and the excellency of our God.

#### DUTIES OF SUPERIOR TO INFERIOR RACES.

SEC. 6. In our republic our acts of Congress forbid the intrusion of white men into the Indian Reservations, where the tribes are living under the paternal protection of the federal government, and the sale of liquors (fire-water) to the Indians is forbidden. Indian agents watch over these savage sons of the forest and prairie to protect them from the intrusion of the whites, except farmers, mechanics, teachers and missionaries, engaged in improving and civilizing the red men. Under these kindly efforts local Indian States



have arisen, self-governed and advancing in the agricultural and mechanic arts, with an Indian printing-press and newspaper, with flocks and herds, with cultivated farms, comfortable houses, and many of the products of civilized life. These facts are found in the Indian Reservation west of the Mississippi. The Indians in other positions present some of the same approaches to civilization, but the tribes recede below this level in various degrees, until we reach the true savage state, where murder of men, women and children, burning houses, stealing, lying and intoxication by the free use of fire-water, with an occasional *auto da fe* of a burning captive, are esteemed the most inviting objects of life. The squallor, the wretchedness of the Indian and his demoniacal character, exhibit the real savage of America as one of the most detestable and repulsive of the human family. There are a few, and very few, of our real aborigines that exhibit noble and generous qualities, and these, by amiable poets and philanthropists, have been, by mistake, taken as true samples of aboriginal character.

The government has acknowledged a possessory title in the Indian tribes, and from the first settlement at Plymouth has bought off this title, and the republic has become the gratuitous trustee of many millions for the various Indian tribes, the interest of which is devoted to teaching them the industrial arts of peace and civilization. The red men are savage in nature, and it is wonderful that the government has succeeded at all in the work of civilizing and Christianizing them. Those tribes that take to the arts of civilization may be preserved; those who do not, will vanish within a century, with the buffalo and the deer, from our national territory. From the days of the Indian apostle, Elliott, and of the great philanthropist, William Penn, who seems to have been providentially sent to America to breathe love, charity and good will to all men,

into the spirit of the future and unforeseen republic, no effort has been wanting to preserve and civilize the Indians. If few are saved, it must be on account of the cruel, savage and untameable character of the Indian. Who will lament that free Christian white men, with their farms, their flocks and herds, their churches, their towns and cities, shall cover our vast western territories, over which the savage and buffalo now roam?

It is deeply to be regretted that Great Britain has forced upon the Chinese the fatal opium drug, destructive of the souls and bodies of the Orientals. In India the drug is produced, and many millions are annually poured into British coffers by this shocking traffic. When the late war between France and Great Britain as allies and China closed, British opium was by treaty included, as a result of victory, as an article of import, subject to certain duties. Before, the article was strictly forbidden by Chinese law and was subject to confiscation. What strange anomalies nations present! In India, the land of the poppy, the British public seminaries, among their books of instruction have numbered the Vedas and the Shaster, while the Bible was excluded, and in one of the first of these schools Nena Sahib was educated, with other like princely cut-throats. The conquered Hindoo, the follower of Mahomet and the blinded Papist have been provided, in different portions of the wide-spread British dominions on which the sun never sets, with money from the British treasury to support these systems of superstition, all of which proscribe the Bible and the simple principles of the Gospel. Perhaps our republic is not without its anomalies as well as other nations.

It is clearly the duty of every Christian people, yea, of every nation, to treat dependent and inferior races with Christian love and kindness, and diffuse the Bible and its blessings among them. It is a duty of American States,

where slavery prevails, to remember the declaration of Paul in his discourse at Athens, that God hath made of one blood all nations of men, for to dwell on all the face of the earth, and deal with the servile population according to the golden rule of the Gospel. God, who created the earth and man to inhabit it, has, in a way to us unknown, made from Adam and Eve many varieties of men in color, form and mental development, and imposed upon the dominant white races the duty of protection and just and benevolent dealing with the inferior, shaded and colored races. If any object to our suggestions let him listen to Jehovah, speaking by Isaiah: "My thoughts are not your thoughts, neither are your ways my ways, saith the Lord; for as the heavens are higher than the earth, so are my ways higher than your ways, and my thoughts than your thoughts."

## CHAPTER XVII.

### AMERICAN UNION.

THE American Revolution forced into existence the confederacy of the American colonies and its manifest imperfections, endangering our national existence and our liberties, and gave rise to the Constitution of the United States. At its adoption our republic had almost three millions of people, burdened with a heavy national debt, and having a small commerce and trifling manufactures. The country was poor in every thing except the energy and enterprise of a free people over whom the Constitution spreads its protection.

Now we have some thirty millions of people, with great wealth, commerce, power and national glory. Among the four great powers of the world the United States holds a prominent position. Our people, since 1783, have built a mercantile navy rivalling that of Great Britain, numerous great cities, about four thousand miles of canals, twenty-six thousand miles of rail-roads and thirty-three thousand miles of electric telegraphs, and have established innumerable churches, schools and colleges. Our States have risen from thirteen to thirty-three, and will soon reach fifty.

The area of our republic is now more than three millions two hundred thousand square miles, stretching from the Atlantic to the Pacific Ocean, with a sea line of coast of some five thousand miles.

By 1900 our population will probably be ninety mil-

lions, if our Union continues. Such are the fruits of American energy, enterprise and free institutions, under our glorious Union and Constitution. Our progress, happiness and prosperity are unparalleled: Foreign emigrants are flocking to our shores, and the friends of freedom everywhere are looking to our republic as the hope of the world.

Our mission, by Providence, seems to be to establish man's capacity for self-government, and to diffuse over the world free Christianity and free institutions by means of American commerce and influence. The maintenance of our republican Union is essential to the performance of our mission, and is demanded alike by duty and by patriotism.

A firm adherence to the Union was impressed by Washington in his Farewell Address to his countrymen. The same sentiments were repeated by Hamilton, Madison, John Jay, Franklin, John Adams, Jefferson, Jackson, John Quincy Adams, and by a long line of American statesmen and patriots. In the Senate of the United States, Henry Clay and Daniel Webster often asserted the same principles, and enforced them by their powerful eloquence. On one occasion the great expounder, in reference to the suggested peaceful secession of certain southern States, said: "Peaceable secession! Sir, your eyes and mine are never destined to see that miracle. The dismemberment of this vast country without convulsion? The breaking up of the fountains of the great deep without ruffling the surface? Who is so foolish? I beg everybody's pardon who expect to see any such thing. Sir, he who sees these States, now revolving in harmony around a common centre, and expects to see them quit their places and fly off without convulsion, may look the next hour to see the heavenly bodies rush from their spheres, and jostle against each other in the realms of space, without causing

the wreck of the universe. There can be no such thing as a peaceable secession:" (5 *Webster's W.* 61.)

In view of the high mission and unparalleled prospective greatness of this country, under our national Constitution, every American patriot will repeat the noble sentiment of President Jackson: "The Union, it must and shall be preserved."

## CHAPTER XVIII

### CONGRESS FOR THE IMPROVEMENT OF THE LAW OF NATIONS. —TRUE PRINCIPLES OF MUNICIPAL LAW AND INTERNAL ADMINISTRATION OF STATES AND NATIONS.

SEC. 1. The compact of the Holy Alliance, in accordance with the general and settled opinion of Christendom, having fixed the Gospel as the true basis of international and municipal law, all States and nations are bound to conform their external and internal policy to the principles of the Gospel. (See same, Appx.)

The time has arrived when the law of nations ought to be embodied into an improved code. The belligerent code ought to be changed, as proposed by the government of our republic, so that war shall be confined to armies, navies, military and naval arsenals, to armed ships, to forts, to fortified places, and to the capture of arms, ammunition and munitions of war, and of vessels carrying them to an enemy, or transporting soldiers or mariners in the military or naval service of a belligerent, so as to confine war and right of capture to warlike persons and instruments, by sea and land. War would then simply interrupt all peaceful commerce and intercourse between the belligerents, and leave the trade between them and neutral nations wholly unaffected by the war. By this plan private property of the people of the belligerents would be free from capture, by sea and land, and the enemy would not be allowed to take it without making full compensation. In the Mexican war our republic

adopted these benign principles. This would put an end to the capture of enemies' merchant vessels, sailing to and from a neutral country, and to making their crews prisoners of war. It is to be hoped that a European and American Congress of commissioners may soon be appointed to form a code of international law, and report the same to their respective nations for adoption. The Congress would be consultative, and would merely prepare and propose the international code.

SEC. 2. The internal administration of nations ought to be guided by the principles of the Gospel. This is one of the great doctrines of the compact of the Holy Alliance. Civil and religious freedom, a free press and a wise application of the national resources to promote general education, industry and happiness, are obvious duties.

The forms of government must of necessity be various. In North and South America and Australia, and in the British Possessions of North America and the West India Islands, the republican form of government will no doubt prevail, and our republic will be the model of confederation and internal administration.

In Europe, monarchy, with a constitutional representation of the people, seems to be required by the principles of the Gospel and by the true interest of every nation on that continent. Public opinion and a free press must be incorporated with every State and nation to enlighten and restrain rulers, to protect the people from oppression, civil and ecclesiastical, and to give strength to every government and happiness to every people. General education and increase of intellectual power, with rewarded and aided industry in all its forms, will add power and glory to a State or nation more rapidly than an expansion of territorial sovereignty. No nation can prosper where despotic hierarchies and oppressive concordats are established, and these are in direct conflict with the principles of and pro-



hibited by the compact of the Holy Alliance. Freedom, civil and religious, is the true interest of every State, and the only sure foundation of its happiness and prosperity. The removal of serfdom and slavery, as fast and as far as practicable, seems an obvious duty in every State and nation.

All governments, whether republican or monarchical, have a direct interest in the education, prosperity and happiness of their people.

The great efforts at internal improvement and education in many of the leading nations of Europe and America assure us that the next century will be indeed one of progress.

SEC. 3. In Europe, the best model of government for the next century is probably monarchy, surrounded by republican institutions. Habit, education and the condition of the European people seem to support this suggestion. As General Lafayette informed the author of this work, Louis Philippe was raised to the French throne upon an express agreement that France should enjoy republican institutions, with a king in place of a president—a pledge faithlessly repudiated by the citizen king—on account of which he was justly expelled from France. The observance of the principles of the Gospel will insure the prosperity of every State and nation.

## CHAPTER XIX.

### OBEDIENCE TO THE LAW OF NATIONS.

SEC. 1. The permanent welfare and glory of every sovereign State demand a faithful obedience to the law of nations, founded on the precepts of the Gospel. Self-preservation calls for it; interest and duty require it. International and municipal law are based upon the Gospel, and obedience to them is necessary to the happiness and prosperity of every State. The violation of those celestial doctrines has swept away the Assyrian, the Egyptian, the Greek and the Roman empires; and the ruins of Balbec, Palmyra and Thebes, the shattered Parthenon and the remains of Roman grandeur, all attest the suicidal effect on empires of disobedience to God's law of nations. Spain, once great and powerful, has fallen by her atrocious national offences from vast power in the reigns of Charles V. and Philip II. History teaches that national sins, by a fixed moral law, punish the States that commit them. Self-preservation, as well as the obligation of the divine law, demands a voluntary obedience to the precepts of the Gospel in all international transactions.

President Fillmore, in his Annual Message to Congress of 1850, declared the golden rule of the Gospel the true basis of American international duty and policy.

The sanctions of that law cannot be disregarded, or its sure penalties avoided, as the King of Kings enacted it. All nations before Him are as the small dust of the bal-

ance; they are counted to him as less than nothing, and vanity. He holdeth the seas in the hollow of his hand; He weigheth the mountains in scales; He sitteth on the circle of the earth; He ruleth the hosts of Heaven and the inhabitants of the earth. His title is Jehovah in the Highest.

May our republic and all nations obey that law and enjoy its promised blessings.

## CHAPTER XX.

### IMPROVEMENT AND ENFORCEMENT OF THE LAW OF NATIONS.

SEC. 1. By many publicists the law of nature or natural equity is declared the foundation of the law of nations. The precepts of the Gospel are the basis of all law. It is a moral code of general principles, which, intelligently and honestly applied, will solve every question of international right and duty. The difficulty in practical discussions of public law arises from self-interest, ambition, pride and passion, which, mingling in exciting controversies, lead diplomatists to mistake or misapply these doctrines to sustain the views of their respective nations. In monarchical and despotic governments of all forms force is a familiar instrument of administration, and reason and the Gospel are often disregarded.

SEC. 2. The sovereign remedy for this evil in Europe will be found to be a European Diplomatic Congress, and a general treaty for disarming the nations down to a police standard agreed on, so as to remove the means of and incentive to invasions, as well as the danger of wars and conquests.

SEC. 3. Another mode of arresting the keeping up of armies and carrying on wars is by legal prohibition of foreign loans or contributions for such objects, by the rich maritime States, where funds are generally borrowed. Commerce requires customers able to buy and to produce, and all wars diminish both. Hence, commercial nations are bound by duty and interest to prohibit all loans and supplies for foreign warlike purposes.

## INTERNATIONAL CODE.

SEC. 4. In this age of civilization and improvement, a liberal code of public law, based upon the golden rule of the Gospel, and assented to by the leading nations of Europe and America, is a great *desideratum*. Nations, by adopting such a code of general principles, would be bound by them in all diplomatic discussions, and the only debatable points would be their application.

SEC. 5. The law of nations may be improved by an enlightened national public opinion, judiciously and courteously expressed by a free press, by public and legislative assemblies and by diplomatic communications to other governments on appropriate occasions. Such expressions of opinion on international transactions and law are a natural right of freedom. (6 *Webster's W.* 491.) And they exert a most beneficial effect in restraining despotic governments from violating the law of nations and the principles of natural equity. (1 *Lord Brougham's Political Philosophy*, 217.)

SEC. 6. Flagrant violations of the law of nations authorize different remedies, according to circumstances. If a war is carried on by employing savages, or by a semi-barbarous people, in violation of the civilized usages of Christian nations and of the laws of humanity, a nation or nations having the ability, may properly arrest such a war by force, if necessary. This proceeds on the principle of preventing a revolting national atrocity. The intervention of Great Britain and her allies, and the destruction of the Turkish fleet at Navarino to save the Greeks from further massacre, was proper and justifiable on this ground. For the same reason, any one seeing a person about to kill another, is bound to stop him if he can.

So, if a semi-barbarous or other nation, without any just cause, commences a savage war, destructive of the

commercial interests of other nations, the injured neutrals, on the ground of self-defence, may demand and enforce a cessation of hostilities.

Though officers, civil, military and naval, of a nation, are not generally liable for any official act, as it is deemed national, they may forfeit this immunity by acts wholly disallowed by the usages of Christian nations. The Mexican massacre of Texian prisoners, in violation of the faith of capitulations and the usages of war was such an act. General Houston, on this ground, might well have visited the guilty Mexican general with capital punishment for this offence after capture at San Jacinto. But Texian humanity and generosity spared the offender. In such cases the injured nation must judge of the punishment due to offenders.

There are cases where self-defence authorizes the pursuit of murdering savages into a neighboring nation that allows them an asylum, and there punishing them and their white allies by military power, as the only means of chastising the murderers and preventing renewed massacres in the territory of the invading nation. The invasion of Florida, while owned by Spain, by General Jackson, pursuing the Seminole Indians, and there punishing certain red and white murderers, was justified by our Secretary of State, John Quincy Adams, and were justifiable as the only practicable means of obtaining justice and self-protection. For injuries done to Spaniards by the invasion, our government finally made compensation.

By the Florida treaty with Spain of 1819, the United States stipulated to satisfy any damages suffered by Spanish officers or inhabitants in Florida by the operations of the American army there, and acts of Congress were passed to execute the treaty. (13 *How.* 45.)

SEC. 7. If a combination of nations avow a determination to exterminate all forms of government not conforming to their own, the nations whose governments are me-

naced may lawfully resort to any necessary means of defence, and consider any hostile movement to that end as a *casus belli*. The declaration of the French Convention, that France would prostrate all European monarchies by force, and of the Holy Alliance afterwards, in 1822, at Verona, that all representative governments should be destroyed, presented such a case. The first, very naturally, united all monarchies thus unjustly assailed; and the latter brought Great Britain, the United States and American nations to resist, unitedly, the unjustifiable pretension to give universality to despotism. (3 *Webster's W.* 207, 211. *Secretary Buchanan's Letter to Am. Minister at Madrid, of June 17, 1848.*)

In short, no American intervention by force in European affairs is allowable, and no European interposition in American governmental matters is permitted. It is a great cardinal principle of American policy and law, essential to the peace and prosperity of nations. The annual message of the President to Congress in 1851, thus announced this doctrine: "Friendly relations with all, but entangling alliances with none, has long been a maxim with us. Our true mission is not to propagate our opinions or impose upon other countries our form of government, by artifice or force, but to teach by example, and show by our success, moderation and justice, the blessings of self-government and the advantages of free institutions. Let every people choose for itself, and make and alter its political institutions to suit its own conditions and convenience. But, while we avow and maintain this neutral policy ourselves, we are anxious to see the same forbearance on the part of other nations whose forms of government are different from our own. The deep interest which we feel in the spread of liberal principles and the establishment of free governments, and the sympathy with which we witness every struggle against oppression, forbid that we should

be indifferent to a cause in which the strong arm of a foreign power is invoked to stifle public sentiment and repress the spirit of freedom in any country."

SEC. 8. In ordinary violations of the law of nations, any government injured may resort to negotiation, mediation, arbitrament or war, in extreme and important cases of national injury. Other governments, their people and a free press may express their opinions with Christian courtesy, with a view of enforcing justice and comity among nations, and no such acts can properly be complained of or noticed officially by the conflicting nations, except so far as diplomatic communications are made.

SEC. 9. All nations, and their people, within their own respective jurisdictions, have a right of freedom of speech and of the press, and to do any act lawful by their laws; and no foreign nation can make them the basis of any police or judicial action, as the sovereignty of every nation is limited to its own territory, and it cannot act on foreigners for any thing done elsewhere, and lawful where done; for that would be an invasion of the sovereignty of other nations, and against national comity. (*Secretary Webster's Letter to Hulsemann. 6 Webster's W. 491.*)

## DIPLOMACY.

SEC. 10. Candor and promptness in diplomatic communications are a sure means of settling national difficulties, and of completing the most important international transactions. The celebrated De Witt, Grand Pensioner of Holland, and the English Minister, Temple, acting on these principles, arranged the important treaty of the Triple Alliance in three days. (4 *Burke's W. 496.*) All surreptitious or uncandid proceedings are unfavorable to international peace and justice. Delays in diplomacy are



justly offensive to injured nations and ought to be carefully avoided, as they add insult to injury.

#### LAWS OF HUMANITY.

SEC. 11. The laws of humanity are, of necessity, a part of the code of public law, and nations must judge of their right and duty to suppress atrocities attempted or perpetrated by one people upon another. So, if domestic cruelty and persecution are practiced by any government upon a portion of its subjects or citizens on account of their religious opinions, any foreign government, in its discretion, may interpose, by diplomatic remonstrance, to arrest such wrongs, and, if these are not heeded, by arms, if deemed expedient. On this ground Cromwell, the great Protector, by his distinguished Secretary, Milton, sent strong remonstrances to the Duke of Savoy against the atrocious Papal assassinations and persecutions of the Waldenses, because they were Protestants. On this ground the British government, by Lord John Russell, remonstrated with the Grand Duke of Tuscany, in the Medai case. Atrocious persecutions for religious opinions, not agreeable to any government, may, therefore, justly form a ground of foreign interposition to sustain the laws of humanity.

So may other outrages on humanity. The shooting of some fifty prisoners at Havana, belonging to the indiscreet and unfortunate invading force of Lopez, upon a drum-head trial and judgment, when the prisoners were captured on the high seas, was, in our judgment, one of those high-handed offences that called for severe reproof from the United States, if not chastisement.

In enforcing the laws of humanity care must be taken that the most humane, practicable measures of repression or punishment shall be resorted to for suppressing or pre-

venting such atrocities. Of these matters each nation must judge under its responsibility to God.

SEC. 12. The Congress of European nations, assembled at Paris to settle the terms of peace and other national matters, resolved to establish the principle of free ships, free goods, as part of the code of the law of nations, which the American public had long and earnestly insisted on. The Congress declared this principle and the freedom of the seas, and thus secured laurels in peace more durable than the victories of Alexander the Great, of Cæsar or of Napoleon.

The condition attached, prohibiting volunteer naval armaments, aimed solely at our republic, must have been intended as a void condition, that all the members of the Congress knew that the European nations they represented had no right to annex by the law of nations, (1 *Phillimore's Int. L.* 225,) and that the United States would, of course, disregard.

This English writer on public law says: "The right of self-preservation is the first law of nations, as it is of individuals." Again, he says: "All means which do not affect the independence of other nations are lawful for this end. No nation has a right to prescribe to another what those means shall be, or to require any account of her conduct in this respect." (*Ib.*)

He declares that self-preservation allows the use of the necessary force to prevent, as well as to repel an attack.

Hence our republic, in common with all nations, accepts the freedom of the seas and rejects the illegal condition. Our volunteer forces, by sea and land, will, as heretofore, arouse when the tocsin of freedom sounds, and cover the sea and land with the armed hosts of freemen, in defence of our national rights and of free institutions.

## CONGRESS OF PARIS, 1856.

SEC. 13. The Congress of Paris, at the close of the Crimean war, has finally settled the doctrine that all riparian nations, bordering on navigable rivers, straits, bays, great lakes and seas, and other like waters, connecting by natural navigable communications with the seas and oceans, have a right to enjoy an equal navigation of such waters, free from all impediment; and that all neutral nations have a right to such free navigation in carrying on lawful commerce with any such riparian nation. The 15th, 16th, 17th, 18th and 19th articles of the Treaty of Peace of March 30th, 1856, declare this a part of the public law of nations, and the Congress applied it to the Danube and its mouths. This settles finally and forever this great and just principle of public law, and it will hereafter be applied to all the navigable rivers of Europe, as well as of North and South America. (*Annuaire des Deux Mondes*, 1855, 1856, pp. 901, 904.)

By article 23d of that treaty, the principalities were secured an independent national administration, full liberty of worship, of legislation, of commerce and of navigation. (*Ib.* 905.) Here great natural rights are proclaimed and guaranteed by this Congress of nations.

By articles 11, 12, 13 and 14 of the treaty, the Black Sea and all its ports are declared free to the commerce of all nations, and interdicted to vessels of war, except a small marine police fixed by the treaty. (*Ib.* 903, 904.)

The ministers of Russia, Great Britain, Prussia, Austria, Sardinia and the Sultan, by treaty, bound Turkey to interdict to all war vessels the Dardanelles and Bosphorus, so long as the Porte is at peace, with the exception of the armed police agreed on. Thus the Black Sea, and the straits leading from it to the Mediterranean, have been set

apart from war, and devoted to commerce and peace. (*Ib.* 906.)

SEC. 14. By a declaration of the same seven nations, dated April 16th, 1856, the contracting parties announced as principles of public law—

1. Privateering is, and remains abolished.
2. The neutral flag covers enemy's goods.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast by the enemy.

They declared these principles binding between powers that acceded to them. (*Ib.* 907.)

The Sultan, at the instance of this Congress, put forth a declaration of freedom of religion to his people.

The improved principles of public law, with the exception of the one intended to affect the United States, may henceforth be deemed incorporated in the code of international law. •

This Congress and its acts form an epoch in public law and its history is honorable to the seven nations composing that body.

## CHAPTER XXI.

### ADMIRALTY AND PRIZE COURT JUDGMENTS.

THE national courts of our republic are, by the Constitution, independent of the President and Congress, and our admiralty courts are, therefore, truly judicial tribunals. An appeal, in Great Britain, lies from any admiralty sentence to the King or Queen in council, and it may there be affirmed or reversed. Hence, these prize courts follow acts of Parliament and orders in council, though directly in violation of the law of nations, of the freedom of the seas and the rights of humanity. (2 *Rob. Adm. R.* 131, 167. *Chitty's note*, 172, to *Vattel*, P. 392, Am. ed. 1839.)

In contested questions of public law the British prize courts are merely registral, and not judicial. Of course their decisions in such cases are of no authority, as they are mere expressions of the policy and will of the sovereign. The so-called admiralty decisions enforcing the British orders in council, by which American and neutral commerce were destroyed, and their ships and cargoes seized and confiscated, are of this class, and so avowedly made.

The other admiralty courts of Europe are of like character, and are of no authority on contested questions of international law. Our war of 1812 was forced on our republic by these invasions of American rights, and of the freedom of the seas.

## CHAPTER XII.

### NATIONAL EXPANSIONS, AND TREATMENT OF COLONIES OF CEDED AND CONQUERED PEOPLE.

SEC. 1. In all cessions of territory or acquisitions by conquest the natural, inherent and inalienable rights of man must be regarded. And this principle must be respected in the municipal laws and administration affecting a ceded or conquered people and their territory. It is upon this principle that the laws and customs of a conquered or ceded country, by the law of nations, continue until changed by the new law-making power, and all wise and humane nations allow the existing laws, language and customs of the people to remain as far as practicable, notwithstanding cession or conquest. A contrary course is as unwise as cruel. The inhuman policy of Charles V. and Philip II. towards the Moors, descendants of the once victorious and cultivated Arabians, forcing them to change their religion, language, laws and customs, was an outrage on humanity, perpetrated by an unholy alliance of royalty with the Pope of Rome and the Grand Inquisitor of Spain, which drove this oppressed people to rebellion, and desolated the fairest provinces of the Peninsula. The silk culture, the Moorish manufactures and high cultivation were destroyed in many large districts of Spain, and the exiled Moor carried to France and Africa his arts and industry.

The expulsion and extermination of the Moors was as unwise as ferocious, and swept away the prosperity and

industry of the richest and best improved portion of Spain, and entailed debility and decay on that fine country, whose climate, soil and position are unequalled.

SEC. 2. Great Britain in North America and India has pursued a contrary policy, and adapted its government and laws to the ancient customs, language, laws and superstitions of the conquered people, and although in some respects she doubtless has erred, the general British policy was in accordance with equity and humanity, as well as with the law of nations.

SEC. 3. The nations of Europe, ancient and modern, have sought power and wealth by conquests, by arms, by sea and land, and to make conquered people tributary to them. Colonies have been planted upon the same principle, and governed with a view to draw the greatest sums from them to the mother country. To sustain such a system great armies and navies are necessary, and force, at an immense cost, must be constantly employed to keep subject nations and colonies in obedience.

Hence wars, rebellions, national debts, taxes, poverty and misery, with royal despotic governments, are the natural results of this system. The war of the American Revolution, and those of Europe from 1793 to 1815, the Hungarian and Polish rebellions, the Indian rebellion of 1857 and 1858, the wars of the Spanish-American revolution, and the war of 1859, by Sardinia and France against Austria, for the liberation of Italy from the oppressive yoke of her German conqueror, all arose from attempts, by naval and military force, to extend or maintain dominion over tributary, conquered nations or colonies. Roman, Austrian, Russian and British dominion over foreign people and territory reposed, and now rest on the sword.

SEC. 4. The republic of the United States has extended its dominion only by voluntary annexation, as in case of Texas, or fair purchase and cession, by treaty, as in case

of Louisiana, Florida and portions of Mexico. Mexico had insulted and long plundered Americans, and defied our power of redress; and when all Mexico was conquered and lay at our mercy, the United States bought a portion of the country, and paid for it to American citizens to the extent of their just claims, and the balance was paid in money to Mexico. To all these countries the right of self-government is extended, and States, upon a perfect equality with the original States of our Union, have been or are to be organized. Our expansions extend the area of freedom and self-government, and require no armies or navies for any internal or governmental purpose. Each State being a complete municipal sovereignty, bound to the Union by a constitution enforcing peace and harmony, has its own laws, and its freedom and happiness are in the hands of its own people, and the national government is bound to protect each State against domestic insurrection and foreign invasion. Self-government is co-extensive with our republic, and no tributary or subject States can belong to it. The area of freedom is co-extensive with the republic. This is the only true, safe and wise principle of national expansion.



## CHAPTER XXIII.

### AMERICAN OR MUNICIPAL LAW COMMON TO OUR STATES, THE DISTRICT OF COLUMBIA AND THE TERRITORIES.

SEC. 1. Our republican institutions are original, and rest upon elementary principles peculiar to them. Hence, in the District of Columbia, in the States and territories of our Union, the basis of our municipal law reposes upon universal and all-pervading doctrines, to which we have affixed the appropriate name of American. They form no part of the common or civil law, but are elementary principles of our republic, set forth in constitutional provisions, concurring judicial decisions and State compacts. The State constitutions as well as that of the United States, embrace much of these fundamental elements of our American law.

SEC. 2. The following doctrines are common to our municipal system: The people have a right to self-government, and by their State constitutions confer the powers of representative administration upon executives, legislatures and judicial tribunals, separate and limited powers, to make laws, to expound them and to execute them; that the legislatures have a general authority to pass laws, subject to constitutional limitations and to those that belong to our system, and that the State executives and courts are vested with these distinct powers, subject to the same limitations. To these are to be added those of the Constitution of the United States, for the people formed their separate State municipal sovereignties and the national government, by which a common nation-

ality was organized for the American republic. These constitutional powers in each department are incapable of deputation or permanent transfer. (10 *How.* 511. 8 *Ib.* 581. 9 *Ib.* 603, and c. 5, §§ 13, 18—21.)

SEC. 3. No man shall be deprived of life, liberty or property without due process of law. For these, in despotisms, there is no security. Philip II. of Spain, James I. and II. of England, Charles I. and other kings furnish numerous examples of violations of our principle. In all despotic countries endless wrongs have arisen, in all ages, from the want of this doctrine. By our American rule no party can be divested of any thing by any tribunal, without personal service of process, or due legal notice to appear and defend his or her rights. (1 *Curtis' C. C. R.* 311, 322—326. 11 *How.* 437. 12 *Pet.* 623. 4 *Ib.* 466. 14 *Ib.* 154. 4 *Hill's N. Y. R.* 146. 2 *How.* 60. 3 *Dall.* 386. 4 *Selden's N. Y. R.* 481, 483. 7 *Johns.* 477. 5 *Watts & Serg.* 173. 6 *Cranch*, 87—135.)

SEC. 4. No bills of attainder or *ex post facto* laws can be passed by a State legislature to take away from a man and his family his property, or to punish him for offences committed prior to the passage of a law. Nor can any outlawry exist here depriving one of his legal rights. These modes of imposing penalties and punishments for past transactions, a fertile source of judicial and legislative murders and wrongs in Europe, are wholly suppressed in our republic. Nor can a law be passed impairing the obligation of existing contracts. (5 *How.* 295. 6 *Ib.* 301. 16 *Ib.* 369. 1 *Ib.* 311, 363. 2 *Ib.* 608.)

SEC. 5. No cruel or unusual punishments can be imposed by any State law or act of Congress, and, as a consequence, our government is humanely administered. Crucifixion, torture, beheading, bastinadoing, starving criminals, confining them in unwholesome dungeons, and all inhuman punishments, are prohibited. Nor can unreasonable bail

be demanded in bailable cases. All these atrocities, common to despotisms, ancient and modern, are excluded from our republic.

SEC. 6. All laws are in their nature prospective.

SEC. 7. All property and franchises are subject to the sovereign right of eminent domain, but full payment must be made, as a condition of their being taken for public use. (*Ch. 3.*)

SEC. 8. All franchises are emanations from and part of the constitutional legislative power, and subject to its control, to its recall and to its regulation. (8 *How.* 581. 10 *Ib.* 534. 13 *Pet.* 595. 11 *Ib.* 545. 11 *Wend.* 586. 8 *Maine R.* 365. 9 *How.* 603. 8 *Pet.* 738, c. 5, §§ 13, 18—21; c. 6.)

In this country the common law of England has not been adopted as to franchises, and in our Union no person or corporation can lawfully claim or exercise any franchise, unless expressly granted by or under a general statute, or by a special legislative enactment. As a franchise is not property, but a governmental instrument, it remains always subject to legislative authority. (*Ib.*)

SEC. 9. No person is bound, when charged with crime, to give evidence against him or herself. This rule forbids not only torture to enforce confession, but allows the accused to be entirely silent, and to act and speak in his or her defence in person, or by counsel, as he or she may elect. Our law, controlling all national and State courts, provides that every man must be personally present and fairly tried, and that, if acquitted of a criminal charge, he cannot be again tried for the same offence; and if convicted, the judgment, unless set aside on appeal, is final, and precludes a second trial for the same offence. It was held by the Supreme Court of New-York, and correctly, in Goodwin's case, that if the jury disagree and neither

convict or acquit, no complete trial is had, and the accused may be re-tried.

SEC. 10. No one's house can be searched unless upon a warrant issued by a magistrate, upon proof, on oath, of something being concealed there connected with some crime. There can be no seizure of one's papers, or taking possession of his house by the police, to endeavor to find evidence of guilt. An American's house is his exclusive dominion. This rule of our law, and that set forth in section 3, preclude all arbitrary police action, such as is common in European monarchies, and all arrest or confinement of a person on a criminal charge, unless on due proof of crime made before a magistrate and on legal process. Letters *de catchet*, and illegal arrests of persons or seizure of property unauthorized by law, are prevented by these invaluable principles.

The *habeas corpus* is the writ of liberty, and secures the removal of all illegal restraints of personal freedom in any State, District or Territory. A conflict of jurisdiction sometimes occurs, when a State tribunal issues this writ to inquire into the legality of an imprisonment by process issued by a national court or officer. In such case, if the arrest is by a national process, pursuant to an act of Congress, the State court or judge has no power to proceed further, and must leave the national tribunal to hold the accused and proceed to a final judgment and execution. The Supreme Court of the Union so held in Booth's case.

SEC. 11. Freedom of speech and of the press are guaranteed throughout the United States. They are the main supports of our institutions.

SEC. 12. Every American citizen has the right to keep and use arms for any lawful object of defence or pleasure. Surrounded, as the first occupants of every new country are, by savages, this right is essential to their safety from the tomahawk and scalping-knife of the Indian and from ani-

mal ferocity, and it is equally so to render impossible the conquest of American freedom by a foreign or domestic foe. Americans, bred to industry in the midst of danger, combine, in a high degree, the love of peace, and its avocations, with an adventurous and warlike spirit. They are at the same time devoted to peace and ready for war. This principle of American law is most invaluable.

Martial law in a State can only be established by a State statute; and in the District of Columbia and in our territories by an act of Congress.

SEC. 13. That all conveyances of or liens on land, shall be plain and simple and recorded; and the general American doctrine is, that our soil shall be held in allodial and free titles. The public domain is granted in fee simple with a view that every citizen, as well as foreign immigrant, may, at a small price, buy farms, and become lords of the soil. As our system of law relating to realty is so different from that of England, our courts would do well to construe our law in accordance with our institutions, and reject, as far as possible, the complicated distinctions of British feudal law.

In grants of land and franchises, by our national and State governments, the grantee takes nothing by implication. (Ch. 6.)

SEC. 14. Freedom of religion is another American doctrine. It pervades our Union. Our Sunday laws are not in derogation of but in support of religious liberty.

SEC. 15. All national navigable waters in our States are subject to the commercial control of Congress; but the soil under these waters, great lakes, rivers, bays, seas, from ordinary high-water mark, belong to the States respectively, to the extent of their territories. On the sea-coasts a maritime curtilage, with its fisheries thereon, belong to the States, and the State has authority to regulate such fisheries, wharves, ferries and local improvements,

subject to the paramount regulating acts of Congress and treaties of the United States.

A State owns in trust for the people the soil under national navigable waters, whether the tide ebbs and flows there or not; but the respective legislatures may grant, for the public good, to the riparian proprietors and others, a right to occupy the soil below ordinary high-water mark to low-water mark and beyond, for wharves, slips, piers or for fishery purposes. (16 *Pet.* 367. 15 *How.* 426.) As these grants are franchises, they remain within the control and regulation of the legislature. (*Ib.* 4 *Seld. R.* 473. *Ante*, c. 5, §§ 13, 18—21. 8 *How.* 581. 10 *Ib.* 511, 534, 535. 14 *Ib.* 80.)

If a subsequent legislature revoke, and newly regulate such franchises, they may do so, notwithstanding an uninterrupted use for a very long period, as no prescription or *laches* can be set up against the public. (*Ib.*) But if private property is taken by a legislature that is connected with the granted franchise, the grantee being in no fault, a compensation for that, and not for the franchise, ought to be made. (*Ib.*)

In the District of Columbia and the national territories, the United States hold the soil under navigable waters as a like governmental trust; and upon the organization of new States they succeed to these rights, as equals of the old States.

SEC. 16. Every State regulates by its laws titles and liens on real estate, wills, deeds and mortgages thereof, subject to our treaties.

SEC. 17. All derelict property, real or personal, found in a State to which there is no legal owner, by virtue of sovereignty, belongs to a State.

SEC. 18. Treason against a State is an attempt by force to overthrow it, or its constitution or some law. This benign principle of American law precludes all construc-

tive treason, and consequent legal assassinations and confiscations, which filled England for several centuries with mourning and desolation.

SEC. 19. No law of entails or feudal titles are allowed, and property is, by State statutes, equally divided among relatives of the same degree of consanguinity. This puts a complete legal bar in the way of the organization of any aristocracy or oligarchy, and ensures the perpetuity of our republican institutions. As a part of this policy in all our States, realty is grantable and devisable by the owner thereof. And our American law forbids titles of nobility to perpetuate freedom and equality.

SEC. 20. The equality of our States, is part of American law.

SEC. 21. Judgments and judicial proceedings *in personam*, founded on personal service of process within a State jurisdiction, are entitled to full force and effect in every other State of our Union. Judgments *in rem* in a State, District of Columbia or a territory, if regular, and the courts have jurisdiction of the property taken and sold, are valid everywhere in our Union to pass the title, but they are not judgments *in personam* anywhere. (Ch. 4, 5.)

SEC. 22. International and inter-state comity are part of American law. (Ch. 4, 5.)

SEC. 23. By our law, pervading the States, national territories, District of Columbia, and all places ceded by the States to the United States, all contracts are illegal and void, wherever made, that contravene or attempt to evade the policy of the national government, or any act of Congress, or any treaty of the United States, or the policy or law of any State or territory, provided such policy, act, treaty or law are constitutionally adopted, passed or made. And all courts in our Union are bound so to decide when a case judicially presents the question.



So all contracts *mali in se*, wherever made, and polygamous marriage contracts, are illegal and void throughout our Union. (11 *Wheat.* 261. 4 *Pet.* 188, 436, 487. 4 *Comst. N. Y. R.* 456. 17 *How.* 232. 14 *Ib.* 38. 16 *Ib.* 314. 3 *Cranch*, 242. 7 *Pet.* 586. 16 *N. Y. Ap. R.* 511. 15 *Pet.* 450, 525, 594.)

SEC. 24. As all persons employed, appointed or elected under the national, State, district or territorial governments of our Union to perform any administrative, executive or judicial functional acts for and by authority of the sovereign, the people, it follows that every officer and every person holding any office or employment must personally discharge the governmental duties confided to him; and that he cannot sell, assign or depute such public office or employment; and that every contract to do so is illegal and void. (1 *Selden's N. Y. Ap. R.* 285. 15 *Ib.* 532. 17 *Ib.* 144. 4 *Comst. N. Y. Ap. R.* 454—457. 5 *Law Rep.* (Boston,) 106—113. 1 *Nott & McCord's R.* 14. 2 *Ib.* 21. 16 *N. Y. Ap. R.* 161—167, and notes, pp. 163—168. 9 *Wend.* 175. 1 *Hill R.* 21. 6 *Paige*, c. 68. 2 *N. H. R.* 517.)

In some of our States, sale or deputation of an office or public employment is indictable by statute. (*Ib.*) All offices and employments under government, from the highest to the lowest, are fiduciary personal, and not assignable or deputable. These principles arise out of our institutions, and are fundamental, and part of the universal law of our republic. The reason is, that these are the people's instruments of carrying on their self-government. Hence, a State legislature, subject to constitutional limitations, may change the duties of any public employment or office, or abolish it, or increase or reduce the fees thereof; and this may be done even though the legislative act creating it declare the same, and its fees, perpetual, as it is not property, but a political franchise. And every



succeeding legislature has the same power of legislation with its predecessors. (*Ib.*) Franchises, as well as all public offices and employments, are not property, but governmental powers. All of them are within legislative authority, subject to constitutional limitation. *Ib.* 8 *How.* 581.)

SEC. 25. The above is a succinct view of a portion of the leading principles of our American law. Other portions of our universal law, growing out of our free institutions, or consecrated by compacts, constitutions, or by concurrent State and national action, are explained in the residue of the work.

## CHAPTER XXIV.

### RECIPROCAL OBLIGATIONS AND DUTIES OF GOVERNMENT AND PEOPLE.

THE sovereigns of Europe, except the Sultan, signed or assented to the Holy Alliance, and thereby declared the obligation of all governments to carry into effect the precepts of the Gospel in their international relations, and in their respective domestic, municipal administration and laws. (See *Holy Alliance*, Appx.) There is a reciprocal duty on the part of the people to obey and support such authority and such laws in all States, whether republican or monarchical. These benign principles may well be called holy, as the law of force ruled supreme prior to the coming of the Prince of Peace, Jesus Christ. By it, Chaldean and Babylonian, as well as Indian, Egyptian, Persian, Greek, Roman, Macedonian and Carthaginian power was built up; and by force were these mighty nations overthrown, and most of the monuments of their greatness are levelled in the dust. The pyramids and a few remains of Greek, Egyptian and other architecture remain as memorials of dead empires. Where is the Mahomedan and Saracenic dominion so vast, founded on force? Where is the mighty and wide-spread kingdom in Europe, America and the East of Charles V. and Philip II. erected and ruled by force and cruelty? Where the broad and magnificent government and conquests of Napoleon I.? Gone, all gone. Force gave and force took away. As Christianity and intelligence advance, the pre-

cepts of the Gospel must regulate and control men in all relations.

The Phoenicians, the Greeks, the Carthagenians, the Spanish, the Dutch and the British have planted colonies, and sought in vain to make them wholly dependent on the mother countries, and to extract from them the largest amount of profit. Great Britain lost her thirteen united colonies by the Revolution and the treaty of 1783, and the United States have already risen from three millions of people to some thirty millions; they have, in 1859, thirty-three States, and territory enough to form some twelve or fifteen more. This loss was the result of the selfish and despotic British rule in North America. Spain, more arbitrary and cruel, has driven from her Mexico and her vast South American possessions. Cuba still remains to the mother country, and is treated as a field for royal and vice-royal plunder and taxation. The Creoles or native Spanish inhabitants are excluded from all offices, and by arbitrary, military power, heavy and grinding taxation is levied on the Cubans on all imports of slaves, produce and merchandise, openly or secretly, to fill the coffers of her royal and vice-royal oppressors. Cuba is the Dead Sea of civil and papal despotism. Considering the history of the past, and that Spanish royalty, in defiance of treaty obligations and of those of humanity, patronizes an extensive slave trade, that basely prostitutes the American flag to cover this cruel traffic, and has encouraged the landing of cargoes of slaves on our shores, the Spanish rule in Cuba must soon end. The forbearance of our republic under enormous duties on our produce and manufactures, insults to our flag, its use by Spanish slave ships and persistent injuries to our citizens, and the patience of the enslaved and trampled-down Cubans have ceased to be virtues, and the Queen of the Antilles, and Porto Rico, her fellow-sufferer, will soon form a new republic by the

overwhelming power of American emigrants and of Cubans and Porto Ricans, or they will be ceded to our Union for a moderate sum, to avoid their loss by rebellion and independence.

All colonies ought to be treated as a kind parent treats a child, and, when grown to maturity, their independence should be granted as soon as they are able to join the family of nations. This is the course of duty, and promotes the interest of all parties.

The duty of obedience depends on the conformity of the administration to the precepts of the Gospel, and every people have a natural right to change an oppressive for a free government, by elective franchise or by the sword of revolution. So that just and enlightened rulers alone are entitled to the obedience of the people subject to their authority. Liberal governments alone are stable and permanent.

In short, the government of every country should adopt the precepts of the Gospel as its rule of municipal administration, and make the prosperity, freedom, intelligence and happiness of the people the objects of its power, and the means of its national glory.



## APPENDIX.

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“HOLY ALLIANCE BETWEEN THE EMPEROR OF ALL THE RUSSIAS, EMPEROR OF AUSTRIA AND THE KING OF PRUSSIA, SIGNED AT PARIS, THE 14-26TH OF SEPTEMBER, 1815.”

“In the name of the Most Holy Trinity,” these sovereigns declared to the world that the precepts of the Gospel were the only true basis of international and municipal law, and that they firmly resolved to regulate their municipal administrations, as well as their foreign relations thereby. This is the substance of this compact, and it was executed *triparte* by the parties, and the same was afterwards assented to, in some form, by all the sovereigns of the Christian nations of Europe, including the Pope. (*Gardner's Moral Law of Nations.*)

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RECIPROCTY AND FISHING TREATY OF OUR REPUBLIC AND GREAT BRITAIN, OF JUNE 5TH, 1854.

This treaty makes common the right of fishing upon the British and American coasts, down to latitude 36° north, as set forth in the first and second chapters, and then follows the third and fourth articles in these words:

“ART. 3. It is agreed that the articles enumerated in the schedule hereunto annexed, being the growth and produce of the aforesaid British Colonies or of the United States, shall be admitted into each country respectively free of duty.

### SCHEDULE.

“Grain, flour and breadstuffs of all kinds; animals of all kinds; fresh, smoked and salted meats; cotton, wool, seeds and vegetables; undried fruits, dried fruits; fish of all kinds; products of fish, and all other creatures living in the water; poultry, eggs; hides, furs, skins or tails, undressed; stone or marble in

its crude or unwrought state; slate; butter, cheese, tallow; lard, horns, manures, ores of metals of all kinds; coal; pitch, tar, turpentine, ashes; timber and lumber of all kinds, round, hewed and sawed, unmanufactured, in whole or in part; firewood; plants, shrubs and trees; pelts, wool; fish oil; rice, broom-corn and bark; gypsum, ground or unground; hewed or wrought or unwrought burr or grindstones; dyestuffs; flax, hemp and tow unmanufactured; unmanufactured tobacco; rags.

"ART. 4. It is agreed that the citizens and inhabitants of the United States shall have the right to navigate the River St. Lawrence and the canals in Canada, used as the means of communicating between the great lakes and the Atlantic ocean, with their vessels, boats and crafts, as fully as the subjects of her Britannic Majesty, subject only to the same tolls and other assessments as now or may hereafter be exacted from her Majesty's said subjects, it being understood, however, that the British government retains the right of suspending this privilege on giving due notice thereof to the government of the United States.

"It is further agreed, that if at any time the British government should exercise the said reserved right, the government of the United States shall have the right of suspending, if it think fit, the operation of article 3 of the present treaty, in so far as the Province of Canada is affected thereby, for so long as the suspension of the free navigation of the River St. Lawrence or the canals may continue.

"It is further agreed, that British subjects shall have the right freely to navigate Lake Michigan with their vessels, boats and crafts, so long as the privilege of navigating the River St. Lawrence, secured to the Americans by the above clause of the present article, shall continue; and the government of the United States further engages to urge upon the State governments to secure to the subjects of her Britannic Majesty the use of the several canals on terms of equity with the inhabitants of the United States.

"And it is further agreed, that no export duty or other duty shall be levied on lumber or timber of any kind cut on that portion of the American territory in the State of Maine, watered by the River St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the Province of New-Brunswick."

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